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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants*

vs.

BOOKER T. HILLERY, JR., et al., Appellees

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS, *Appellants*

vs.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., Appellees

On Appeal from the United States District Court for the Northern District of California

No. 73-754 filed November 9, 1973, jurisdiction noted January 7, 1974

No. 73-918 filed December 13, 1973, jurisdiction noted January 21, 1974

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 8, 1971—Plaintiff Hillery's original complaint for injunctive relief and damages filed in U.S. District Court for Northern District of California.

Jan. 13, 1972—Defendants' return to order to show cause and points and authorities in opposition to issuance of preliminary injunction filed.

Jan. 27, 1972—Order appointing counsel, Richard M. Doctoroff, filed.

Mar. 2, 1972—Plaintiffs' interrogatories to defendant Louis S. Nelson filed.

Mar. 8, 1972—Plaintiffs' first amended complaint for damages, and declaratory and injunctive relief filed.

Mar. 10, 1972—Affidavit of defendant Park filed.

Mar. 11, 1972—Plaintiffs' memorandum in support of motion for preliminary injunction, filed.

Apr. 6, 1972—Defendants' notice of motion and motion to dismiss, and points and authorities in opposition to motion for preliminary injunction filed.

Apr. 10, 1972—Defendant Nelson's answers to interrogatories, filed.

Apr. 17, 1972—Order filed submitting plaintiffs' motion for preliminary injunction.

Apr. 27, 1972—Defendants' supplemental memorandum of points and authorities in opposition to motion for preliminary injunction and in support of motion to dismiss complaint filed.

Apr. 27, 1972—Supplemental memorandum of points and authorities in opposition to defendants' motion to dismiss and in support of plaintiffs' motion for prelimnary injunction, filed.

May 2, 1972—Defendants' response to plaintiffs' supplemental memorandum of points and authorities in opposition to defendants' motion to dismiss and in support of plaintiffs' motion for preliminary injunction filed.

May 19, 1972—Plaintiffs' response to defendants' supplemental memorandum of points and authorities in opposition to motion for preliminary injunction and in support of motion to dismiss, and to defendants' response of May 2, 1972, filed.

Sept. 29, 1972—Memorandum of opinion and order granting motion for permanent injunction, filed.

Oct. 5, 1972—Judgment entered in favor of plaintiffs and against defendants under the terms provided in the memorandum of opinion and order granting motion for permanent injunction filed September 28, 1972.

Oct. 4, 1972—Defendants' notice of motion and motion to vacate judgment and order; request for order shortening time; and request for stay of injunction pending hearing filed.

Oct. 4, 1972—Order filed shortening time on defendants' motion to October 11, 1972.

Oct. 11, 1972—Plaintiffs' memorandum of points and authorities in opposition to defendants' motion to vacate judgment and order, filed.

Nov. 1, 1972—Notification and certificate regarding convening of three-judge court filed.

Nov. 1, 1972—Order filed vacating permanent injunction and granting plaintiffs' motion for temporary restraining order.

Nov. 13, 1972—Order of Circuit Court of Appeals appointing three-judge court filed.

Nov. 13, 1972—Motion for an order to show cause why defendants should not be held in contempt, filed.

Nov. 15, 1972—Affidavit of Richard M. Doctoroff in further support of motion for an order to show cause why defendants should not be held in contempt, filed.

Nov. 21, 1972—Defendants' motion to dissolve temporary restraining order filed.

Nov. 22, 1972—Affidavit of defendant Procunier filed.

Dec. 18, 1972—Memorandum of points and authorities in opposition to defendants' motion to dissolve temporary restraining order filed.

Jan. 30, 1973—Memorandum and exhibits in response to the affidavit of defendant Raymond K. Procunier clarifying Administrative Bulletin No. 72/40, filed.

Feb. 7, 1973—Defendants' supplemental memorandum filed.

Feb. 8, 1973—Order filed submitting defendants' motion to dissolve temporary restraining order.

Feb. 8, 1973—Motion for leave to file memorandum of points and authorities, amici curiae, on behalf of

six members of the press and in support of the contentions of plaintiffs, filed.

Feb. 14, 1973—After hearing by three-judge court, orders filed granting motion for leave to file memorandum, amicus curiae, and allowing defendants ten days to respond, and taking under submission the defendants' motion to dismiss complaint and defendants' motion to dissolve temporary restraining order.

Feb. 23, 1973—Defendants' response to memorandum of amicus curiae filed.

Aug. 16, 1973—Opinion, declaring, *inter alia,* that section 415.017 is unconstitutional, and enjoining its enforcement filed.

Sept. 13, 1973—Defendants' notice of appeal to the United States Supreme Court filed.

Oct. 11, 1973—Notice of appeal of plaintiffs Pell, Segal and Jacobs to the United States Supreme Court filed.

Jan. 7, 1974—United States Supreme Court notes probable jurisdiction of defendants' appeal and grants motion of plaintiffs Hillery, Spain, Bly and Guile for leave to proceed in forma pauperis.

Jan. 21, 1974—United States Supreme Court notes probable jurisdiction of appeal by plaintiffs Pell, Segal and Jacobs, consolidates the case with defendants' case, and allots one hour for oral argument.

Booker T. Hillery, Jr.
Box A-32262
Tamal, California 94964
Plaintiff.

District Court of the United States
Northern District of California

No. C-71-2150
Civil Action

Booker T. Hillery, Jr., Plaintiff,

vs.

California Department of Corrections, Its Agents, Raymond Procunier, Director and Its Agent, Louis S. Nelson, Warden and James W. L. Park, Associate Warden, Does One through Eleven, California State Prison at San Quentin, California, Defendants.

[Filed Nov. 8, 1971]

Class Action Pursuant to Rule 23(a), (b), and (d) of the Federal Rules of Civil Procedure, (Complaint For Injunction Or Of Personal Actual Damages and Punitive Damages).

PLAINTIFF HEREBY MOVE THE COURT FOR A PERMISSIVE INJUNCTION ENJOINING THE DEPARTMENT HEAD FROM ENFORCEMENT, OPERATION OR DENYING PRISON PROCEDURES WHICH DENIES PLAINTIFF AS A CLASS FROM INTERVIEWS, AND FROM HIS REVIEW EDITOR AND STORY EDITOR, IN THAT SUCH DENIAL DEPRIVES PLAINTIFF AS A CLASS OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Jurisdiction

Comes Now, Plaintiff who alleges for a first cause of action:

I.

That the true names or capacities, whether individual, corporate, associate, or otherwise, Defendants named herein as Does One Through Eleven are unknown to Plaintiff, therefore Plaintiff sues said Defendants by such fictitious names, and Plaintiff will amend this Complaint to show their true names capacities when the same have been ascertained.

II.

Plaintiff is informed and believes thereon and alleges that each of the Defendants designed herein as Doe is negligent and responsible in some manner for the improper handling of two applications to Editors and caused injury and damages thereby to the Plaintiff as herein alleged.

III.

That Plaintiff and domiciled and reside within the jurisdiction of the Court; that this action arises under the United States Constitution, and particularly Amendment 14, Section two, and under the law of the United States, Title 42, United States Code, Section 1983, and Rule 23 (a), (b), (1), (A), (B), (2), (3) and (d) of the Federal Rules of Civil Procedure.

IV.

That all of said acts set forth throughout this complaint, were committed by defendants, while acting

under the color, and pretense of the statutes, laws, or executive orders of the State of California; and were not committed by him in his individual capacity.

V.

That on September 7, 1971, at San Quentin, California, Plaintiff was and now is the owner of two Stories which was to be Published immediately by Earth Publishing Corporation, and that on September 29, 1971, the Editors wrote to Plaintiff informing him that visiting applications was needed, which said further that it takes about three weeks to process such applications.

VI.

Jurisdiction is found upon the existence of a federal question: That defendants wilfully denies plaintiff as a class in visiting rights, from the interview with Editors, the said defendants refused to acknowledged applications after the return from Editors and unlawfully converted and disposed of said applications to their own use, and cause personal damages to the Plaintiff's that actual damages in the sum of Fifthy Thousand Dollars ($50,000.00.

As and for a Second Cause of Action:

Plaintiff alleges for a second cause of action against the Defendants, Raymond Procunier, Louis S. Nelson and James W. L. Park and Does One throughout this suit as follows:

VII.

That on or about September 29, 1971, Plaintiff entered into an agreement wherein and whereby Editors wanted to have and interview with Plaintiff whereby Defendants denied to Plaintiff, that the Plaintiff was to enjoy peaceful interview of said Editoring his stories.

VIII.

That Defendants, Raymond Procunier, Louis S. Nelson and James W. L. Park, ever since that said date and now does fail and refuses to compensate Plaintiff for the termination of said stories, to wit: the sum of Five Hundred Thousand Dollars ($500,000.00), or to compensate Plaintiff in any manner or any amount what ever.

IX.

Plaintiff move the Court to take judicial notice that the question of whether the denial of visiting rights, per se, is cruel and unusual punishment to the United States Constitution.

When the efforts of a state prisoner to obtain an available state appellate hearing of his denial are frustrated by the actions of penal officials, there has been a violation of the Due Process Clauses, of the 14th Amendment. Reasonable access to the Courts, state and Federal, is Guaranteed by that clause. *(Hollerbach v. United States* (1914) 233 U.S. 165, 169 [58 L. Ed. 898, 34 S.Ct. 553].)

The responsibility of a governmental agency for positive representations it is deemed to have been made

through defective plans and specifications "is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work. . . ." *(United States v. Spearin,* 248 U.S. 132, 137 [63 L.Ed. 166, 39 S.Ct. 59].) Accordingly, the language in section 4 requiring the bidder to "satisfy himself at to the character . . . of surface and subsurface materials or obstacles to be encountered" cannot be relied upon to overcome those representations as to materials and obstacles which the state positively affirms in section 1A-12 not to exist, and plaintiff was entitled to reply and act thereon. Government Code, section 818.8 reads: "A public entity is not liable for an injury caused by misrepresentation by an employee. At the same time, interest affected by the official action taken here and in Willner was nothing less than "the right to follow a chosen trade of profession." (367 U.S. at pp. 895-896 [6 L.Ed.2d at pp. 1236-1237]), whereas "All that was denied [in Caleteria Workers] was the opportunity to work at one isolated and specific military installation." (367 U.S. at p. 896 [6 L.Ed.2d at p. 1236]) cf. 373 U.S. at p. 103 & fn. 2 [10 L.Ed.2d at p. 229].)

See *Endler v. Schulzbank* (1968) 68 A.C. p. 179, "If plaintiff's allegations prove to be accurate, he will be entitled to defend himself in a formal hearing, unless the Commissioner promptly makes such a hearing available the plaintiff, having no adequate legal remedy, will be entitled to a declaration that the Commissioner from further circulating his charges against the plaintiff or otherwise discouraging his employment."

Indeed, even in cases touching the national security, the United States Supreme Court has construed legislation in such a way as to preserve these due process safeguards whenever their disregard might lead to the arbitrary abridgement of the right to practice one's profession. (See *Greene v. McElroy* (1959) 360 U.S. 474 507 [3 L.Ed.2d 1377, 1396-1397, 79 S.Ct. 1400], holding improper a revocation of an engineer's security clearance without full hearing; cf. *Parker v. Lester* (9th Cir. 1955) 227 F.2d 708, 715-721.) As the Court said in Greene, "Certain principles have remained relatively immutable in our Jurisprudence. One of these is that where governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

X.

That San Quentin is a State Prison, operated by defendants and their agents in and for the State of California, and if ordered by this Court to provide such interviews that Plaintiff was denied by method of keeping him from seeing Editors.

Wherefore, Plaintiff prays against the Defendants as follows:

1. For the Actual damages taken by the Defendants, or pay to the Plaintiff the sum of Fifty Thousand Dollars ($50,000.00), as a reasonable and just sum for the value of said actual damages.

2. That Plaintiff be warded in the sum of Five Hundred Thousand Dollars ($500,000.00) by the De-

fendants, Raymond Procunier, Louis S. Nelson, and James W. L. Park, for termination of said interviews.

3. For Plaintiff's costs of suit herein.

4. That the Court make all necessary and appropriate orders pursuant to Rule 23 (d) of the Federal Rules of Civil Procedure.

For such other and further relief as the Court may deem just and proper in the premises.

Respectfully submitted,

/s/ Booker T. Hillery, Jr.
Booker T. Hillery, Jr.

Dated: Nov. 1st, 1971.

[Jurat, Verification, Motion to Proceed in Forma Pauperis, and Affidavit in Support of Motion to Proceed in Forma Pauperis Omitted in Printing]

United States District Court
Northern District of California

[Filed Jan. 13, 1972]

[Caption Omitted in Printing]

RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO ISSUANCE OF A PRELIMINARY INJUNCTION OR OTHER EQUITABLE RELIEF

Come Now the defendants, R. K. Procunier, L. S. Nelson, and James W. L. Park, and for a return to the order to show cause heretofore issued by this Court state:

I

The complaint fails to pray for equitable relief, or to state facts showing equitable relief is desired or appropriate.

II

The complaint fails to allege exhaustion of administrative remedies.

III

The complaint fails to allege facts showing a federal right to the relief contemplated, showing irreparable harm, or showing a strong likelihood that plaintiff will ultimately prevail.

Wherefore, it is respectfully submitted that the order to show cause should be discharged and that equitable relief should be denied.

Dated: January 13, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—Criminal Div.

Doris H. Maier, Assistant Attorney
General—Writs Section

John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

Points and Authorities

Petitioner, a condemned inmate of the California State Prison at San Quentin, brings this action under the Civil Rights Act, 42 U.S.S. § 1983, and other purported grounds of jurisdiction.

The complaint, as we read it, alleges that plaintiff owns two stories (it is not specifically alleged that he wrote them), that they were to be "Published immediately by Earth Publishing Corporation," that the editors of said corporation wrote to plaintiff informing him that visiting applications were needed, and that defendants denied said applications. This Court ordered the complaint filed and, on its own motion, ordered defendants to show cause why equitable relief should not be granted pending trial. There are three reasons why no such relief should be granted:

I

The complaint fails to pray for equitable relief or to state facts showing equitable relief is desired or appropriate. The complaint seeks only money damages. It contains nothing indicating that plaintiff has a continuing desire to receive a visit from the editors of Earth Publishing Corporation, that such editors continue to desire to visit him, or that defendants continue to refuse permission for such a visit. For all that appears from the complaint, plaintiff merely wants money and has no desire to have equitable relief granted. We do not doubt the power and duty of this Court liberally to construe the pleading of an untrained prisoner in favor of the pleader. But we

submit that the extraordinary remedy of equitable relief should not be granted in the absence of some indication on the part of plaintiff that it is desired.

II

The complaint fails to allege exhaustion of administrative remedies. The Rules of the California Department of Corrections expressly permit any inmate to send a sealed letter to the Warden of his institution and to the Director of Corrections. It is not alleged that plaintiff has utilized this remedy to attempt to obtain the visiting permits sought.

III

The complaint fails to allege facts showing a federal right to the relief contemplated, showing irreparable harm, or showing a strong likelihood that plaintiff will ultimately prevail.

It should be borne in mind that the complaint does not allege any attempt to restrict the content of plaintiff's writings or any attempt to restrict mail correspondence between plaintiff and any publisher. No claim of access to counsel or courts is involved. Plaintiff's sole assertion is that he has a constitutional right to a personal visit with a publisher or his representative for the purpose of discussing an article or story presumably written by plaintiff. A review of the authorities demonstrate that there is no such right. In general, the cases have upheld restrictions on communications between inmates and noninmates far more stringent than any allegedly imposed on plaintiff.

Theriault v. Blackwell, 437 F.2d 76 (5th Cir. 1971), upheld the dismissal of a habeas corpus petition alleging, inter alia, that prison officials refused to mail a letter and a copy of a brief written by petitioner, to the editor of a newspaper. "As the district court held such letters are not 'legal correspondence' but are subject to the prison regulations which govern mailing lists, approved correspondents, and other such matters." *Id.* at 77.

Labat v. McKeithen, 361 F.2d 757 (5th Cir. 1966), held that a person, like petitioner, confined in death row, could lawfully be kept in solitary confinement and denied access *in person or by mail* to anyone other than prison officers, his attorney, physician, or spiritual adviser, or certain relatives.

Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965), upheld a prison rule limiting to twelve persons, plus certain public officials, those with whom an inmate could correspond.

In *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964), Judge Haynsworth held that plaintiff, an anti-Semitic propagandist, had no right to correspond with designated persons, including the American Civil Liberties Union and the American Bar Association, for the purpose of propagandizing them or securing legal assistance in aid of his propaganda efforts.

In *Stroud v. Swope,* 187 F.2d 850 (9th Cir.), *cert. denied,* 342 U.S. 829 (1951), it was held that an inmate of a federal prison has no right to any correspondence whatever for the purpose of publishing his writings.

In *McKinney v. DeBord,* 324 F.Supp. 928 (E.D. Cal. 1970), it was held: "[R]efusing to mail out complaints to persons or agencies other than the courts is not constitutionally objectionable, for it is not interference with access to the courts." *Id.* at 933.

Berrigan v. Norton, 322 F.Supp. 46 (D. Conn. 1971), involved a request for a preliminary injunction in an action brought by Frs. Daniel and Philip Berrigan, federal prisoners, for relief from prison rules requiring that outlines of prospective manuscripts be submitted to a prison official for approval and that the inmate author execute an agreement establishing the terms under which a manuscript may be used and ultimately published. "[C]orrespondence with a publisher or literary agent may not be carried on until these conditions have been met." *Id.* at 51-52. The constitutionality of these rules was upheld and the preliminary injunction denied.

One case, *Tyler v. Ciccone,* 299 F.Supp. 684 (W.D. Mo. 1969), found certain rights to prepare manuscripts and negotiate for their publication on the part of an inmate of the United States Medical Center, Springfield, Missouri. However, the plaintiff had not been convicted of any crime, and his unconvicted status was the basis for the court's finding that he possessed rights not enjoyed by inmates generally.

Even courts recognizing broad First Amendment rights on the part of prisoners have limited their rulings to the rights to carry on correspondence, and have stopped short of finding any rights to personal visits. Thus, in *Nolan v. Fitzpatrick,* 326 F.Supp. 209

(D. Mass. 1971), it was held that inmates have a constitutional right, subject to certain restrictions, to send grievance letters to news media. But the court did not hold that they had a constitutional right to be interviewed by media representatives, and rather indicated that they did not: "There have not been shown any administrative considerations of significance which support a prohibition of a grievance letter to a news medium so long as the right to send a letter does not imply as an essential concommitant the right of the prisoner or of a reporter to follow-up personal interviews." *Id.* at 216-217.

In *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971), while finding the existence of certain First Amendment rights on the part of an unconvicted inmate awaiting trial, the court upheld rules restricting correspondence and visiting rights with friends and business associates and prohibiting interviews with reporters without the approval of the Commissioner of Correction.

We represent to the court that our research has failed to disclose any authority of any sort giving any inmate any federal right under any circumstances to visits or interviews with anyone other than attorneys, physicians, ministers, family and friends. A constitutional right to business visits has not been recognized.

It should be noted that the instant case bears no resemblance to the recent California Supreme Court case of *In re Eli,* 5 Cal.3d 832, 97 Cal.Rptr. 698 (1971). That case held invalid a rule of the Director

of Corrections requiring inmates to donate 25% of their manuscript royalties to the Inmate Welfare Fund. The sole basis of the decision was California Penal Code section 2600, which conferred upon a prison inmate the right to own any written material produced by him during confinement. The rule was held to derogate unnecessarily from the property right granted by that statute. The court expressly refused to consider the petitioners' claims that the rule infringed their First Amendment rights.

Assuming, without conceding, that plaintiff has a First Amendment right to write and publish his writings while in prison, we are unable to see how such a right is infringed by his not being allowed a personal visit with magazine editors. Again, it is not alleged that his correspondence has in any way been curtailed. This Court can take judicial notice that the most common method of communication between publishers and authors is by mail. Writings and publishing are transactions which peculiarly lend themselves to consummation by mail. The normal practice is that an author mails a manuscript to a publisher, who accepts or rejects it, by mail, with or without suggestions. If the manuscript is accepted, the publisher may edit it or may return it to the author for rewriting. There is no reason why any of this cannot be done by mail. Personal contact between authors and publishers is, at least at the pre-publication stage, the exception rather than the rule.

The foregoing is demonstrated by the fact that six of the present condemned inmates of San Quentin

have had their writings published without interviews with the publisher. A list of the names of these men and their publications follows:[1]

Massie, #A-90159: "Teen Recollections from Death Row," Teen Magazine, January, 1971
"Death by Degrees," Esquire, 1970 or 1971

Eli, #B-29114: "A Land Called Freedom," Los Angeles Free Press, March 26, 1971

Welch, #B-22393: "From Christ to Crime to Death Row," Baptist Men's Journal, March 10, 1971
"God is my Cell Mate," Christian Economics, May 6, 1971
"Death Row S.Q. Prison," City Magazine, Ltd., November 22, 1971
"Money Can't Buy God," Christian Freedom Foundation, August 19, 1971
"Christians Come to Jail," Christian Freedom Foundation, September 3, 1971

Robinson, #B-8609: "The End was the Beginning," Christian Freedom Foundation, July 30, 1971

Morse, #A-76006: "The One-Way Street," Listen, December 27, 1971

King, #B-13843: "Happiness is Knowing God," Marian Helpers Bulletin, November 26, 1971

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[1]Because of time limitations, we have been unable to support this list by affidavit. We beg leave of the court to file such an affidavit at or before the time for hearing on this matter.

To put it simply, if a person is literate enough to write a publishable or potentially publishable article, he is literate enough to arrange for its publication by mail. In the absence of a showing that plaintiff could not arrange for publication of his manuscripts by mail, he has shown no basis for either equitable relief nor damages.

It should be noted that, where a showing of necessity or reasonable purpose has been made, defendants have allowed business visits. However, the general denial of such visits is based on the premise that pointless or unnecessary visits present unreasonable security hazards to prison administration.

Because plaintiff has failed to establish the existence of any federal right to a personal visit from magazine editors, and has failed to show how the alleged denial of such a visit could have prejudiced him in the exercise of any federal right, we submit that he has failed to show either irreparable damage or the strong likelihood of ultimately prevailing on the merits. The preliminary injunction must therefore be denied. *Berrigan v. Norton, supra,* 322 F.Supp. at 47-48.

Conclusion

For the foregoing reasons, we respectfully submit that the order to show cause should be discharged and equitable relief denied.

Dated: January 13, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—Criminal Div.
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

[Declaration of Service Omitted in Printing]

In the United States District Court for
the Northern District of California

[Filed Mar. 8, 1972]

[Caption Omitted in Printing]

FIRST AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF.

(CIVIL RIGHTS)

I. *Jurisdiction*

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(3), 1343(4) and 2201. This is a suit authorized by 42 U.S.C. Section 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First, Fourth, Fifth, and Ninth Amendments, and by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This is also a proceeding for a declaratory judgment as to plaintiffs' rights to be free from such deprivation by defendants acting under color of state law.

II. *Introduction*

2. This complaint amends the previously filed *in pro per* complaint of Booker Hillary. It seeks to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel.

3. The application of prison rules and policies on such visits has been arbitrary and unclear, with the prison administration reserving to itself the power

to decide whether specific media can visit specific prisoners. Various media people, including plaintiffs in this complaint, have requested and do desire to visit specific prisoners, including other plaintiffs in this complaint. The purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter.

4. The prisoners' rights to free expression and to privacy are also being seriously infringed. The prison administration is arbitrarily denying prisoners, including some of the plaintiffs in this complaint, the right to speak openly and freely with specific media personnel on their own choice, and with specific persons who desire such visits before publishing transcripts prepared by the prisoner.

5. The result of the prison administration's arbitrary limits on such visits has been that the media have gained access only to that information which the prison administration decides to reveal, creating a serious infringement upon the public's right of access, through the press, to information about the prison. Such infringement is especially serious in this case, since the public is unable to obtain this information on its own.

III. *Parties*

6. Plaintiff, Booker T. Hillery, Jr., is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

7. Plaintiff, John Larry Spain, is and was at all times material herein, a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

8. Plaintiff, Bobby Bly, is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

9. Plaintiff, Michael Shane Guile, is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a white citizen of the United States and a resident of the state of California.

10. Plaintiff, Eve Pell, is and was at all times material herein a free lance writer who has written and edited books and magazine articles concerning prisons and racism. She is a citizen of the United States and a resident of the state of California.

11. Plaintiff, Betty Segal, is and was at all times material herein a reporter for the weekly community newspaper, *Freedom News,* Richmond, California. She is a citizen of the United States and a resident of the state of California.

12. Plaintiff, Paul Jacobs, is and was at all times material herein a free lance writer, an author of many publications concerning racism and prisons, and a reporter for KQED T.V., San Francisco, an educational television station. He is a citizen of the United States and a resident of the state of California.

13. Defendant, Raymond K. Procunier, is and was at all times material herein Director of the Department of Corrections of the state of California. As such Director, he has general supervisory power over all California prisons, including San Quentin Prison. He is sued individually and in his official capacity as Director of Corrections.

14. Defendant, Louis S. Nelson, is and was at all times material herein Warden of San Quentin State Prison. He has general supervision and control of San Quentin, and he is sued individually and in his official capacity as Warden.

15. Defendant, James W. L. Park, is and was at all times material herein Associate Warden of San Quentin Prison. He is sued individually and in his official capacity as Associate Warden.

16. Defendant, Joseph R. O'Brien, is and was at all times material herein Associate Warden of San Quentin Prison. He is sued individually and in his official capacity as Associate Warden.

IV. *Class Action*

17. Plaintiff prisoners bring this action on their own behalf and pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other prisoners of San Quentin State Prison subject to defendants' jurisdiction and affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are question of law and fact common to the class; the claims and defenses of plaintiffs are typical of the

claims and defenses of the class; and plaintiffs will fairly and adequately protect the interests of the class.

18. Plaintiff people connected with news media bring this action on their own behalf and pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other people connected with news media who are affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims and defenses of plaintiffs are typical of the claims and defenses of the class; and plaintiffs will fairly and adequately protect the interests of the class.

V. *Facts*

19. Plaintiff, Booker T. Hillery Jr., a black prisoner at San Quentin, is the writer of two short stories about which he was negotiating with *Earth Magazine* for publication.

20. During September 1971, both Jane Harada, Review Editor, and Lloyd Linford, Stories Editor, of *Earth Magazine* requested permission from prison officials to visit plaintiff Hillery for the purpose of discussing publishing Mr. Hillery's writings, and for the purpose of gaining information for their own articles concerning prisons.

21. In letters to both Ms. Harada and Mr. Linford dated October 5, 1971, defendant Associate Warden Park, in behalf of defendant Warden Nelson, denied requests for a visit with plaintiff Hillery. (See Exhibits A and B attached to this complaint.)

22. Plaintiff Hillery was unable to meet with eitheir of the requested editors from *Earth Magazine*, his articles were not published, and he thereby has incurred a loss of $550,000.

B. *John Larry Spain—Eve Pell*

23. Plaintiff Eve Pell is a free lance author and editor of publications concerned with the oppression of third world peoples in the United States and also the conditions of the adjustment centers in California prisons. On February 12, 1972, plaintiff Pell requested permission to interview plaintiff John Larry Spain. (See Exhibit C attached to this complaint.)

24. In response to her request, on February 15, 1972, defendant O'Brien denied her application. (See Exhibit D attached to this complaint.)

25. John Larry Spain is a talented black writer who has spent much time in San Quentin's adjustment center. One of his letters has already been published in a recent book, edited by plaintiff Pell, *Maximum Security,* Dutton 1972. Plaintiff Spain was housed in the adjustment center at San Quentin on August 21, 1971, the day that George Jackson and five others were killed. Information concerning that eventful day has only been released by prison officials at this time.

C. *Bobby Bly—Betty Segal*

26. On February 6, 1972, plaintiff Betty Segal wrote a letter to defendant Nelson requesting permission to interview plaintiff Bobby Bly, regarding a law suit he had filed in the United States District

Court for the Northern District of California. *(Bly v. Procunier,* C-71-2019 AJZ, now pending before the court) The letter made plain that plaintiff Segal was requesting to visit plaintiff Bly with a view toward publication of information relevant to the pending court action. The suit involves allegations that San Quentin prison officials arbitrarily and unfairly locked up over one hundred prisoners, primarily black and chicano, because of their political beliefs and not because of any violation of prison rules or regulations. This information would be published in the *Freedom News.* This request is attached to this complaint as Exhibit E.

27. On February 16, 1972, defendant O'Brien replied to plaintiff Segal's visitation request. The reply denied plaintiff the opportunity to visit with plaintiff Bly now or in the foreseeable future. The reply is attached to this complaint as Exhibit F. Plaintiff Bly was never informed of this request by defendants.

28. Plaintiff Segal has now and will continue to have a legitimate and necessary need to meet with plaintiff Bly. The information which plaintiff Segal needs pertains directly to both factual and subjective material necessary to convey a complete representation to the public at large of the issues raised in the action filed by plaintiff Bly.

D. *Michael Shane Guile—Paul Jacobs*

29. KQED educational television reporter, plaintiff Paul Jacobs, requested permission to interview plaintiff Michael Shane Guile, a white prisoner at San Quentin, on February 15, 1972, in order to discuss

prison conditions, recent events at San Quentin, and to obtain his views of racism and the relationship between blacks and whites within the walls. (See Exhibit G attached to this complaint.)

30. On February 17, 1972, defendant O'Brien replied to Jacobs and denied his request to see plaintiff Guile. (See Exhibit H attached to this complaint)

E. *Discrimination*

31. At this time other media representatives have interviewed specific prisoners at San Quentin Prison. (See Exhibit I attached to this complaint)

VI. *Equity*

32. Plaintiffs and members of their classes have no plain, adequate or speedy remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and an injunction is their only means of securing adequate relief. Plaintiffs and members of the classes they represent are now suffering and will continue to suffer irreparable injury from defendants' policies as set forth herein.

VII. *Prayer*

33. Wherefore, Plaintiffs respectfully pray that this court enter judgment granting plaintiffs and all members of their classes:

(a) A declaratory judgment that Defendants' acts, policies and practices complained up herein violate Plaintiffs' rights and the rights of members of the Plaintiffs' classes secured by the First, Fourth, Fifth, and Ninth Amendments and by the due process and

equal protection clauses of the Fourteenth Amendment.

(b) A preliminary and permanent injunction prohibiting defendants from denying permission for interviews between prisoners and persons representing various media, including but not limited to plaintiffs and classes in whose behalf this suit has been brought.

(c) A preliminary and permanent injunction requiring Defendants, their agents, and employees to formulate, promulgate and institute specific rules and regulations to expediate visits between prisoners and media persons, including but not limited to plaintiffs and classes in whose behalf this action has been brought.

(d) Compensatory damages in the amount of $550,000.00 for the Plaintiff Hillery, and punitive damages in the amount of $25,000.00 for each named plaintiff and each member of plaintiffs' classes.

(e) A trial by jury.

(f) That this court retain jurisdiction over the parties and matters herein mentioned.

(g) For Plaintiffs' costs and attorney fees for this suit.

(h) And for such other and further relief as this court shall in its judgment find fit and proper.

Dated: March 8, 1972

/s/ Richard M. Doctoroff
Richard M. Doctoroff
Patti Roberts
5406 Clarement Avenue
Oakland, California 94618

Exhibit A

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

October 5, 1971

Re: Hillery, Booker T. Jr.
A-32262
Condemned

Miss Jean Harada, Review Editor
Earth Publishing Corp.
The Agriculture Bldg.
Embarcadero at Mission
San Francisco, California 94105

Dear Miss Harada:

We regret to inform you that you have been denied visiting privileges with Mr. Hillery as you are not a friend of prior acquaintance.

Very truly yours,
L. S. Nelson, Warden
By James W. L. Park
Associate Warden
Administration

JWLP:ss
cc: Inmate

Exhibit B

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

October 5, 1971

Re: Hillery, Booker T. Jr.
A-32262
Condemned

Mr. Lloyd Linford
Earth Publishing Corp.
Agriculture Bldg, Embarcadero at Mission
San Francisco, California 94105

Dear Mr. Linford:

We regret to inform you that you have been denied visiting privileges with Mr. Hillery, as you are not a friend of prior acquaintance.

Very truly yours,

L. S. Nelson, Warden
By James W. L. Park
Associate Warden
Administration

JWLP:ss
cc: Inmate

Exhibit C

February 12, 1972

Warden Nelson
San Quentin State Prison
Tamal, Ca. 94964

Dear Warden Nelson:

I am writing to request permission to interview Mr. John Larry Spain, B-8672. I have permission to do so from his attorney, Elaine Wender.

I am co-author of *To Serve the Devil,* a history of different racial groups in the United States (with Paul Jacobs and Saul Landau) and editor of *Maximum Security: Letters from Prison,* recently published by E. P. Dutton and Co., and I have written for magazines as well.

I would like to discuss with Mr. Spain prison conditions, his opinions about the prison movement growing in the nation, and other matters.

Sincerely,
Eve Pell

Exhibit D

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 15, 1972

Re: Spain, John Larry
B-8672

Ms. Eve Pell
2308 Divisadero Street
San Francisco, Ca. 94115

Dear Ms. Pell:

Your recent letter to Warden Nelson requesting permission to interview Mr. Spain has been referred to me for reply.

Departmental policy does not allow for interviews with specific inmates.

Very truly yours,

L. S. Nelson, Warden

/s/ J. R. O'Brien
Information Officer

JRO'B:ajr

Exhibit E

February 6, 1972

Warden Louis Nelson
San Quentin Prison
Tamal, Calif. 94964

Dear Warden Nelson:

I am writing this letter to ask formal permission to interview an inmate by the name of Bobby Bly, A-67097. He is one of the plaintiffs in a Federal court action in which our newspaper is interested.

If possible, I would like permission to interview Mr. Bly either this coming Friday in the afternoon, or the Friday following at any time of day. During the coming week it is not possible for me to come to the prison any other day but Friday.

I sincerely hope you will see fit to allow me to interview this man.

Very sincerely yours,

Elizabeth K. Segal

Exhibit F

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 16, 1972

Re: Bly, Bobby
A-67097

Ms. Elizabeth K. Segal
Freedom News, Inc.
Box 1087
Richmond, Ca. 94802

Dear Ms. Segal:

In reply to your letter of 2/6/72 to Warden Nelson, this has been referred to me for reply.

Presently we do not have interviews with specific inmates by press representatives.

All men are able to have interviews with attorneys whey they request a visit with an attorney.

Very truly yours,

L. S. Nelson, Warden
/s/ J. R. O'Brien
Information Officer

ajr

Exhibit G

February 15, 1972

Warden Louis Nelson
San Quentin Prison
Tamal, California 94964

Dear Warden Nelson:

I would like permission to interview Mr. Michael Shane Guile, B 5757, at Tamal for some work I am doing in preparing a television program on how prisoners see the prison system. I have the permission of Mr. Guile's attorney, Richard Doctoroff, for this interview. Please let me know if this is agreeable to you.

Sincerely yours,
[Paul Jacobs]

PJ:dd
blind carbon copy: Eve Pell

Exhibit H

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 17, 1972

Re: Guile, Michael Shane
B-5757

Mr. Paul Jacobs
2500 Filbert Street
San Francisco, Ca. 94123

Dear Mr. Jacobs:

In reply to your letter of February 15, 1972, regarding an interview with Mr. Guile, presently we have regulations that do not allow for interviews with specific inmates.

Very truly yours,

L. S. Nelson, Warden
/s/ J. R. O'Brien
Information Officer

ajr

Exhibit I

THE SAN QUENTIN SCROUNGER

(Picture Omitted)

Inventor Bob Lokey Demonstrated His Power-Saw Safety Brake
San Quentin Fire Chief Stan Nordstrom turned the crank
By Jim Brewer

You don't hear much about San Quentin inmates like Bob Lokey.

Like thousands of others of the infamous prison in Marin county, the sandy haired native of Texas puts in his time and waits for the day when he can return to the world outside.

During the nine years Lokey has served toward his possible life sentence, he has gained a reputation on the inside rivaling that of the more controversial inmates.

Fellow inmates know him as a scrounger. His closest associates know him as a budding genius. And prison officials know him as a man "who has really found himself."

But all of them know him better as an inventor.

Models

Working only in his spare hours, Lokey has designed and built working models for a variety of new gadgets including:

⊙ A machine that writes faster than previous methods of Braille transcription.

⊙ A magnetized screwdriver that can be demagnetized with a flip of the wrist.

⊙ A typewriter alignment tool.

⊙ A collapsible wheel block for heavy trucks.

Demonstration

In a tool shed behind the prison firehouse where he puts in his daily work time, Lokey demonstrated his most prized invention for The Chronicle last week.

"It's a working model of a power-saw safety device that will allow wood to be cut or ripped, but will not allow the cutting of human flesh," he said.

"Just don't say too much about how it works. I don't have a patent on it yet."

The makeshift power saw, not unlike the ones you find in the home workshop, was activated. Lokey placed a small piece of wood behind the whirling blade and inched his index finger closer and closer.

With less than a quarter inch left between his finger and the blade, the machine snapped to a halt.

"It's impossible to cut human flesh with it," he said. "Even a 5-year-old could operate it in complete safety."

To prove his point, Lokey made a simple adjustment and repeated the demonstration. The saw blade again slammed shut—this time with more than two inches between his finger and the blade.

"It makes use of an amplified radio frequency," Lokey said. "Just leave it at that."

Idea

The 31-year-old inmate said the idea for the safety saw "just occurred to me one day." Lokey explained, "I just figure it out in my mind first and then build. This one took me about three years."

He limits himself to materials that are available inside the walls. "The administration cooperates with me, but I don't like to ask for expensive stuff. Broken down junk is good enough."

When Lokey arrived at San Quentin, he had a tenth-grade education. Today, he has an associate of arts degree in the social sciences. He is also president of Lokey Tool, Inc., a company he recently formed with two partners on the outside.

"I really enjoy tinkering more than anything else I've ever done," he said. "When I do get out of here, they won't have to worry about me doing anything anti-social. All I want is to find a place to work."

United States District Court
Northern District of California

[Filed Mar. 10, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES W. L. PARK

James W. L. Park, being first duly sworn, deposes and says:

I am Associate Warden Administration of the California State Prison at San Quentin.

I have read Defendants' Return to Order to Show Cause and Points and Authorities in Opposition to Issuance of a Preliminary Injunction or Other Equitable Relief filed in the above-entitled matter. The matter appearing on page 8, line 4, through page 9, line 5, thereof is true and correct, according to the records of the California State Prison at San Quentin.

I declare, under penalty of perjury, that the foregoing facts are true and correct according to the best of my knowledge and belief, and that if called as a witness, I could testify competently thereto.

Dated:

James W. L. Park

[Jurat Omitted in Printing]

United States District Court
Northern District of California

[Filed Apr. 6, 1972]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

To: Richard M. Doctoroff
Patti Roberts
Attorneys at Law
2308 Divisadero
San Francisco, California
Counsel for Plaintiffs

Please Take Notice that defendants will move this Court, in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California, 94102, at 10:00 a.m., or as soon thereafter as counsel may be heard, on Friday, April 28, 1972, for an order dismissing the complaint for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure, Rule 12(b), and for failure to raise a substantial federal question.

If the court and counsel for plaintiffs so desire, and counsel wish to waive time, defendants will be prepared to argue this motion at the next scheduled hearing on this matter, April 17, 1972, at 1:30 p.m.

This motion will be based on all the records and files in this case, together with the proposed order and

memorandum of points and authorities attached hereto, which shall also serve as a memorandum of points and authorities in opposition to plaintiff's motion for preliminary injunction.

Dated: April 5, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General-Criminal Division

Doris H. Maier, Assistant Attorney
General-Writs Section

John T. Murphy
Deputy Attorney General

/s/ George R. Nock
Deputy Attorney General
Attorneys for Defendants

Points and Authorities

Under the complaint, as amended, this is an action under the Civil Rights Act, 42 U.S.C. section 1983, brought by plaintiffs, who are inmates of the California State Prison at San Quentin, and media personnel who have sought to interview prisoners, seeking injunctive relief and damages. Plaintiffs attack California Department of Corrections Administrative Manual section 415.071, which provides: "Press and other media interviews with specific individual inmates will not be permitted." Plaintiffs allege that application of this rule has denied them an asserted constitutional right to interviews between prison inmates and media representatives.

Plaintiffs read the rule as barring any interviews between inmates and the media, and also claim discrimination by citing an instance of an interview which took place after adoption of the rule. Both this reading and the claim based thereon are inaccurate. Although requests from the media to interview specific inmates are not honored, media representatives are permitted to enter the institution and interview inmates whom they might encounter, and who are willing to be interviewed. The interview cited by plaintiffs is merely evidence of implementation of this policy.

The gravamen of the complaint and of plaintiffs' points and authorities is the assertion of a First Amendment right on the part of media representatives to enter state prisons and there interview any inmate whom they designate, and a correlative right on the part of the inmate to be interviewed. Plaintiffs claim that the public "right to know" confers on the media a constitutional right of access to any prison inmate. They further strongly imply, but do not formally allege, that the purpose of the rules under challenge is the protection of prison officials from criticism concerning prison conditions by preventing these conditions from receiving public attention. Plaintiffs' constitutional claims are unfounded and their implication false and baseless. It is our position that the complaint not only fails to state a claim upon which relief may be granted, but totally fails to raise a substantial federal question, and should therefore be dismissed.

The issues might be illuminated by a bit of background on the rules in question. The Department of Corrections had virtually no restriction on press interviews with inmates until August 1971. Under former procedures, news reporters were permitted to interview consenting inmates. The only exceptions were individual cases in which the warden denied interviews for security reasons or out of concern for the welfare of the inmate. Such denials were rare. The warden also retained the rarely used prerogative to impose special controls in individual cases.

This procedure ultimately became unworkable. As California correctional institutions began to receive inmates who were particularly newsworthy, usually because of their activities before coming to prison, certain problems emerged. The first problem was that interviews with such newsworthy inmates were consuming an intolerable number of man-hours on the part of institutional personnel required to provide security and escort service for the interviews. The second, and more serious, problem arose from the fact that certain inmates were receiving wide media exposure. This exposure made heroes of the particular inmates, and conferred upon them the status of inmate leaders. Their leadership status, in turn, created serious disciplinary problems at the institutions.

The seriousness of the disciplinary problems became clear on August 21, 1972, when an escape attempt resulted in the deaths of several correctional officers and the inmate who had received perhaps the widest media exposure. The pendency of a criminal

prosecution resulting from that escape attempt precludes our commenting upon it in detail. Two days later, on August 23, the rule under challenge was adopted. We will submit that the rule is clearly reasonable and denies no constitutional right of plaintiffs or anyone else.

It is worthwhile to clarify what is in issue and what is not. We do not deal here with the issue of the existence of a right on the part of media to enter prisons and interview prisoner or a right of prisoners to be interviewed. Nor do we deal with the issue of a right on the part of prisoners to write letters to the media. Nor do we have a case of prison officials attempting to deny the public information about prison conditions, whether that information comes from the prisoners or from the media. Media access to the prisons is afforded. The subject matter of interviews is not restricted. Prisoners may write letters to the media and are free to criticize prison administrators and detail their grievances concerning prison conditions. The only issue presented by the complaint is whether the Fourth Estate has the federal constitutional right to enter state prisons and interview whomever they wish. There is no such right.

We will not undertake to examine for the Court each of the voluminous citations in plaintiff's thoroughly-researched memorandum, for they all seem to be directed to the proposition that there is indeed a First Amendment, or that some First Amendment rights intrude into the prisons. We are not inclined to dispute either proposition. But plaintiffs have

failed to cite a single case (unsurprisingly, as we have found no such case) holding that there is a constitutional right of the media to interview prisoners or of prisoners to be interviewed. The cases holding that there is no such right are set forth in detail in our earlier Return to Order to Show Cause, etc., which we incorporate by reference herein. More importantly, plaintiffs have failed to cite any authority for their proposition that defendants' regulations refusing to allow the media to interview specific inmates amount to an unconstitutional "prior restraint" on activity protected by the First Amendment.

The vice in plaintiffs' argument consists of its failure to appreciate the difference between the protected activity of publishing information in the possession of the publisher and the activity, unprotected by the First Amendment, of *gathering* information. The distinction was set out by the Supreme Court in *Zemel v. Rusk,* 381 U.S. 1 (1965), which upheld denial of a passport to Cuba against the contention that the petitioner had a First Amendment right to go to that country and inform the American public of conditions there:

> "[W]e cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of *action.* There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example,

> the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 16-17. (Emphasis added.)

Accord, Worthy v. Herter, 270 F.2d 905, 908 (D.C. Cir. 1959); *Dayton v. Hunter,* 176 F.2d 108 (10th Cir.), *cert. denied,* 338 U.S. 888 (1949); *Trimble v. Johnston,* 143 F.Supp. 651 (D.D.C. 1959).

Similarly, in denying an injunction against enforcement of a state court rule preventing the taking of pictures in a courtroom or its environs, the Third Circuit disposed of the appellant's First Amendment claim:

> "Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there.

> Could an interested observer insist on the constitutional right to take motion pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution." *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (3d Cir. 1958).

And in rejecting the First Amendment and Equal Protection claims of a small newspaper which had been denied press credentials given to larger publications, entitling their holders to cross police and fire lines, the California Court of Appeal nicely summed up the law:

> "Restrictions on the right of access to particular places at particular times are consistent with other reasonable restrictions on liberty based on the police power, and these restrictions remain valid even though the ability of the press to gather news and express views on a particular subject may be incidentally hampered." *Los Angeles Free Press, Inc. v. City of Los Angeles,* 9 Cal.App.3d 448, 455, 88 Cal.Rptr. 605 (1970).

It is worthy of note that the courts themselves have taken the lead in restricting the media in their news gathering efforts, by drying up their sources, when deemed necessary or desirable to subserve other values. Vital to the resolution of the entire "fair trial-free press" controversy is the ability of trial courts to issue valid orders preventing parties litigant and

their counsel from talking to the press or public about their cases. Such orders have been upheld. *See, e.g., United States v. Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

So much for the claimed First Amendment right of the press to enter San Quentin and interview whomever they designate. Plaintiffs' other claim, that prison inmates have a First Amendment right to be interviewed by anyone wishing to interview them, is no more substantial. Any rights of inmates, to free expression or to petition, are adequately protected by their being allowed to write letters to the media complaining of their grievances, and by being allowed to participate in interviews by media representatives who enter the institution and interview inmates they might encounter. Any First Amendment rights which inmates may enjoy are clearly subject to limitation in the light of reasonable state interests in such limitation. We have previously detailed the factors—undue consumption of time, and breakdown of prison discipline—which led to the adoption of the rules here under challenge, and submit that these factors demonstrate the reasonableness of the regulations.

In sum, we deal here with rules which give the media and the inmates maximum access to one another consistent with legitimate security interests of state prisons. Protection of prison officials from criticism and the covering-up of prison conditions from the public are neither the motivation nor the effect of the rules. In its interviewing and letter-writing policies, the California Department of Corrections has volun-

tarily gone further than any other American penal system of which we are aware. The Constitution does not require it to go still further.

Conclusion

For the foregoing reasons, it is respectfully submitted that the complaint should be dismissed.

Dated, April 5, 1972.

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant Attorney General-Criminal Division
Doris H. Maier, Assistant Attorney General-Writs Section
John T. Murphy,
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants.

[Proposed Order and Declaration of Service Omitted in Printing]

GRN: jkh SF CR 019920

United States District Court
Northern District of California

[Filed April 10, 1972]

[Caption Omitted in Printing]

DEFENDANT NELSON'S ANSWERS TO INTERROGATORIES

1. Under what circumstances do you allow prisoners to interview outside media who request an interview with a specific prisoner?

A: None.

2. Under what circumstances do you refuse to allow a specific prisoner to interview outside media?

A: An interview is disallowed only if it is specifically requested, or if the inmate is deemed too dangerous to risk an interview.

3. Under what authority do you refuse to allow interviews by outside media with specific prisoners? Cite all rules and regulations, written or unwritten. Also cite all policies, formal and informal.

A: Department of Corrections Administrative Manual Section 415.071, which provides: "Press and other media interviews with specific individual inmates will not be permitted." San Quentin Institution Order No. 300, copy attached hereto.

4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media? List their names, and the names and addresses and publications of the outside media involved in each case.

A: We have no record of this information. Requests by prisoners for interviews with media are rare, and none are recalled.

5. Over the same past year, how many outside media persons requested interviews with prisoners? List their names, media affiliations, and addresses, and the prisoner involved in each case.

A: We have no record of this information.

6. How many of prisoners' requests listed in Interrogatory 4 were refused? List them.

A: We have no record of this information.

7. How many of the media people's requests listed in Interrogatory 5 were refused? List them.

A: We have no record of this information.

8. In each case listed in Interrogatories 6 and 7, explain why the request was refused. Who refused the request? What was his authority? What was his reason? What was the authority for that reason?

A: We have no record of this information.

9. In your answer to Interrogatories 4 and 5, under what circumstances was a media person allowed to interview a specific prisoner? Under what circumstances was an interview not allowed?

A: We have no record of this information.

10. In granting or denying an interview request is it significant whether prisoner or the media person made the interview request? If so, list every case cited in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: It is not significant whether the prisoner or the media person made the interview request, as Administrative Manual section 415.071 precludes its being granted in either case.

11. Do you view an interview between a prisoner and a media person as a security threat to the institution? Explain. List every case cited in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: An interview between the media person and an inmate is a security threat only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates.

12. Is timely notice a factor in deciding whether to allow an interview? List every case in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: Timely notice was a factor prior to August 21, 1971. No specific cases are recalled.

13. What are the rules, regulations, and policies regarding visiting privileges? Who may visit prisoners? When (specify days and hours)? Where?

A: See current visiting rules attached hereto.

14. Are there any rules, regulations or policies formal or informal, for interviews between prisoners and the outside media? What are they?

A: See San Quentin Institution Order No. 300, attached hereto; Administrative Manual section 415.071.

15. In what instances may the substance of prisoners' writings lead you to refuse the prisoners permission to interviews related to his writings? Unrelated to his writings?

A: The substance of prisoners' writings may be the basis for refusing a prisoner permission for an interview related to his writings only if his writings are of a character excludable from the institution pursuant to California Penal Code section 2600. In no case heretofore has an interview been denied for that reason. The substance of a prisoner's writings would not lead me to refuse permission for an interview unrelated to his writings.

16. In what instances may the substantive content of different outside media lead you to refuse them permission to interview a specific prisoner?

A: Only if the publication actively and characteristically advocated murder. No refusal on this basis is recalled.

17. In what instances may experiences with previous interviewing by a prisoner or by a media person lead you to refuse to grant a future interview with the same or other media person?

A: A subsequent interview by the same media person would be refused if that person had engaged in violence or smuggling of contraband into the institution, or had violated the visiting rules. Conduct by an inmate which showed him to be dangerous would prevent him from being interviewed.

18. In Interrogatories 15, 16, and 17; list every instance where the refusal has been made.

A: We have no record of this information.

19. Which officer(s) and/or employee(s) determine whether an interview may take place? Under what authority?

A: This information is contained in San Quentin Institution Order No. 300, attached.

20. Is the classification of a prisoner relevant to whether he may be interviewed? List all relevant classifications (e.g. Death Row; AC; B Section; the various blocks; work furlough; etc.) and cite the rules, regulations, and policies for each.

A: No, except as noted in San Quentin Institution Order No. 300, attached. No interviews are permitted with inmates in the Adjustment Center.

21. In Interrogatory 20, list every case cited in Interrogatories 4 and 5 in which the classification of the prisoner was a factor in the acceptance or refusal of the interview request. In each case, note if it was determinative of the case.

A: We have no record of this information.

Note: Lest the above answers appear misleading, it should be noted that media persons are permitted to enter the institution and interview inmates whom they happen to encounter, and who are willing to be interviewed. If a media representative desires to interview a condemned man, the selection of the inmate

to be interviewed is made at random from among those inmates willing to be interviewed. If more than one condemned inmate is sought to be interviewed, the interviewer is obliged to pay the escort charges for the second and each subsequent inmate interviewed.

I declare, under penalty of perjury, that the foregoing facts are true and correct, according to the best of my knowledge and belief, and if called as a witness, I could testify competently thereto.

Dated: April 7, 1972

/s/ L. S. Nelson

[Jurat Omitted in Printing]

CALIFORNIA STATE PRISON
SAN QUENTIN

Institution Order No. 300

Subject: *San Quentin Public Information and Community Relations Plan*

References: Director's Rules, Chapter IV, Article I and Sections 415, 420, 421 and 422 of the Departmental Administration Manual.

General Policy: Employees must conform to all provisions of the Director's rules and of the Departmental Administrative Manual in carrying out this plan.

I. *Definitions:*

A. *Public Information* is all information supplied to the public in recognition of their right to be informed about the operations, problems, programs and goals of San Quentin and of the Department of Corrections. The term "public" includes both the broad audience reached by news media and a large group of special "publics" such as employees, inmates, business men, union members, educators, service clubs, law enforcement agencies, etc., each of whom have particular interests in various aspects of San Quentin's program.

B. *Community Relations* is the constructive integration of San Quentin and its employ-

ees into the life of both the adjacent communities and the broader community of citizens whose interests are served by the institution and its activities. Community understanding of program objectives and their acceptance of program methods are vital to good community relations. Each employee by his works and actions has an important effect upon community understanding and acceptance of San Quentin.

II. *Objectives of the Public Information and Community Relations Program:*

A. To provide factual, unbiased information about unusual events occurring in the institution.

B. To provide balanced, objective information about the less spectacular but vital elements of the ongoing San Quentin program.

C. To elicit public understanding of and participation in the institutional program.

D. To inform the public about San Quentin Service to society in the prevention of crime through incarceration and re-socialization of offenders.

E. To educate each employee to his responsibilities for the presentation of an accurate and well-balanced picture of the institution.

III. *Organization of Public Information:*

A. The Warden of San Quentin approves and releases all public information, either personally or through specifically designated staff.

B. *The Information Officer:*

1. Releases spot news and answers press inquiries during the regular work day, informs the Warden of releases made, and consults with the Warden prior to releasing news of major occurrences.

2. Coordinates the public information program, clearing press releases developed by other staff members, and providing technical assistance to staff in developing news features.

3. Develops press releases concerning special events and on-going programs.

4. Arranges for special press interviews with staff and inmates, filming of events, etc.

5. Provides technical guidance and gives assignments to the inmate press office, with the cooperation of the Supervisor of Education.

C. *The Officer of the Day:*

1. Releases spot news and answers press inquiries during other than regular working hours.

2. Checks daily with the Warden's Office regarding possibly press inquiries and special events.

D. *Division Heads:*

1. Are responsible for the development of informative news releases concerning their areas of operation. Either complete releases or compilations of information that can be built into a release are routed to the Information officer for clearance.

2. Through staff training create an appreciation of the value of constructive news releases, and encourage their staff to develop same.

3. Are responsible to see that any unusual occurrences, acts of heroism, efforts beyond the call of duty, extraordinary achievement, etc., are referred promptly to the Information Officer for possible press release.

IV. *Policies and Procedures in the Administration of Public Information:*

A. Release of News:

1. Release of spot news by authorized personnel is made to the three newspapers maintaining regular reporters in Marin County. One call to the Marin Press Release Service will reach these papers:

Tlhe San Rafael Independent Journal
Tlhe San Francisco Examiner
Tlhe San Francisco Chronicle
United Press International
Associated Press

2. Release of feature news is made to these three papers, and to other newspapers, wire services, radio and television stations as may be desirable. Feature news releases will be approved by the Warden's Office in every instance.

B. Press contacts by employees on institutional matters is limited to authorized staff or when express permission is granted.

C. Inquiries re development of feature articles by freelance writers, magazines, press services, etc., will always be referred to the Warden's Office for review and referral for Central Office approval when necessary.

D. Interviews of employees by the press and appearance on television or radio must receive prior approval from the Warden's Office. Involvement in controversial subjects will be such that it is clear that the employee is not speaking for the institution, unless authorized to do so.

E. Interviews of inmates by news media:
1. Will be cleared through the Information Officer who will consult with the Warden in controversial or notorious cases.

Rev. 2. Require the consent of the inmate on the CDC 146. Photographing of inmates will require similar approval, although ID shots can be given upon request and without consent since they are a public record.

Rev. 3. Requires supervision appropriate to the type of case. Interviews with men on maximum custody, isolation or administrative segregation will be permitted only if no undue security hazard is present.

4. Interviews with condemned men will always be processed through the Associate Warden, Administration, and the detailed provisions of AM 415 will be followed.

Rev. 5. Inmates awaiting trial will not be interviewed until the trial is concluded.

F. Supervision of television or motion picture crews will be arranged by the Information Officer, as follows:

1. Short news and features: by the Information Officer or by custodial personnel. If the short features involves a particular area, staff from that division may be asked to supervise.

2. For filming sequences, filming agency may be asked to pay for custodial supervision.

V. *Guidelines for Dealing With News Media:*

A. The policy of San Quentin is to give the reporters all reasonable assistance in developing a story, since this aids in the mutual task of informing the public.

B. Answer all inquiries briefly, factually and objectively, without bias, personal opinions or dramatic effects. Answers should be confined to established policy and official information. Personal opinion, especially in controversial matters, should not be released as news. Evaluate statements issued as to the impression they will create if printed out of context and without explanation. Do not issue facetious, cynical or humorous statements, nor use prison jargon or slang.

C. Information released regarding inmates should be limited to objective statements in answer to specific questions from the official record: i.e., age, offense, legal status, assignment, number of disciplinary infractions, etc., privileged information such as psychiatric diagnosis, details from social or other diagnostic interviews, personal attitudes to family, etc., will not be released.

D. Never volunteer "exclusive" stories to one reporter. If a reporter, through his own initiative, develops an exclusive story or information, this "exclusive" should be honored and other reporters should not be told

of this. The activities of one reporter must not be told to others.

VI. *Administration of Community Relations Program:*

A. All employees are responsible to convey objective, realistic information about San Quentin to the public on the job, in community groups and in private contacts.

B. All formal community relations programs will be approved by the Warden prior to being placed into effect. When basic policy has been approved, the staff member responsible will carry out the details of his program, using imagination and initiative in developing information and public participation.

C. The Warden, with the assistance of the Information Officer, will coordinate the various community relations programs.

D. Tours by groups and individuals will be arranged through the Warden's Office.

E. Visits to the Adult Authority are cleared through the Classification and Parole Representative.

VII. *Methods of Encouraging Positive Community Relations:*

A. Public tours of the institution:

1. During the months of February through October, tours of mixed groups, soci-

eties, clubs, etc., of approximately 200 adults, are conducted on Saturday nights. A charge is made to cover costs of food, escort, and a contribution to the Inmate Welfare Fund. The Officer of the Day is ordinarily in charge.

2. Specific reservations are required for individuals or groups. Arrangements are made through staff designated by the Warden.

3. Tours by approved special guests will be arranged by the Warden's Office at any time during the normal working day. The Custodial Division will furnish officer escort, unless otherwise arranged; i.e., educators may be escorted by staff of the Education Department, etc. Such tours begin and end in the Warden's office, with an interview with the Warden or the Associate Warden, Administration, if possible.

B. Citizen participation in the institutional program:

1. Trade Advisory Groups working with both staff and inmate committees.

2. Academic Advisory Committee (works with staff and inmate committee).

3. Citizen volunteers (working with Alcoholics Anonymous, Speakers Clubs, athletic events, and other inmate groups).

C. Exhibitions and displays (annual Art Show, exhibits at fairs, music festivals, etc.).

D. Publications and articles:

Employees are encouraged to submit factual articles for the Correctional Review, professional journals, trade publications, etc. Such articles must be cleared through the Warden's Office for submission to Central Office.

E. Speaking Engagements:

1. Employees, if invited, and with advance notification to their supervisors, can speak to groups on the operations of the institution and the Department of Corrections.

2. Such talks or speeches should be:

   a. Objective, informative and factual. Personal opinions should be clearly identified as such.

   b. Non-partisan in controversial areas, should these arise during discussions.

/s/ L. S. Nelson, Warden
L. S. Nelson, Warden
SQ 10 #300 Dec. 27, 1966
Revised Feb. 15, 1972

CALIFORNIA STATE PRISON
SAN QUENTIN

November 15, 1971

Visiting Privileges

1. Receiving visits is a privilege, not a right and is subject to restriction or forfeiture if any of the following rules are violated.
2. Inmates may receive visits from ten (10) approved persons, who must be members of the family or friends of long standing. Two (2) of the ten (10) visitors will be allowed four (4) visits per month and the others, one (1) visit per month. The inmate will make this designation in writing to the Mail and Visiting Lieutenant. No person under eighteen (18) years of age may visit unless he/she is a member of the inmate's immediate family or unless accompanied by an approved visitor of the inmate who is over eighteen years of age. The visiting period will be one (1) hour in duration.
3. No one may visit unless already approved and on the visiting card. Some exceptions will be made for members of the immediate family if time permits.
4. Inmates who wish to place new visitors on their visiting card will send a completed CDC-105 form in a letter to the prospective visitor and the mail room will remove the 105 and substitute a blank CDC-106. On completion of the 106 the prospective visitor should mail it with a letter to the

inmate. The mail room staff will remove the completed 106 and forward it to the mail and visiting Lieutenant for approval. If facts don't agree, th visiting will be denied and the parties so notified. In some cases where there is doubt clarification will be requested.

5. No more than four (4) people will be allowed on the grounds to visit an inmate at one time. If there are more than four (4) in the party, the visiting hour must be divided among them.
6. Inmates may receive visits from prospective employers with the permission of the Warden or his authorized representative if the visitors are not on the approved list.
7. Visits from former inmates of any penal institutions or from persons involved in or convicted of any type of narcotics offense are prohibited, except by special permission of the Warden. A visitor who is on probation or parole must also have the permission of his supervisor to visit.
8. No male visitors wearing black or blue jeans will be permitted to visit.
9. Visitors are not permitted to leave money or any other articles at the institution for an inmate nor are they allowed to take anything from an inmate. Money must be sent in through the mail by Post Office Money and must be made payable to the Department of Corrections and must indicate the register number and name of the inmate for whom intended.

10. Visiting Hours: Monday, Thursday, Friday:
8:00 a.m. to 3:00 p.m.
Saturday, Sunday & Holiday:
8:00 a.m. to 2:00 p.m.

No Visiting on Tuesday and Wednesday

11. No visits are permitted on New Year's Day because of special activities. On certain days, such as Good Friday and the days preceding Christmas and New Year's Day, the visiting room will close one (1) hour early (on week days). In the event the institution should be in a state of unrest, visiting privileges are subject to cancellation.

12. Anyone entering the institution grounds is subject to being checked through the metal detector, and whenever deemed necessary the Warden or his authorized representative may order the searching of anyone who enters the institution grounds, and persons refusing such search will be denied entrance.

13. All persons entering the institution grounds will carry valid identification in their possession. Example: A valid California State Department of Motor Vehicles Identification Card, or a Driver's License. Also fingerprinting may be requested. If a person does not possess valid identification, or if he/she refuses to be fingerprinted, he/she will be denied entrance. Out of state visitors will have their identification checked by the Mail and Visiting Lt.

14. Bringing firearms, explosives, alcoholic beverages, benzedrine or drugs on the prison grounds con-

stitutes a felony. Visitors should be sure they do not possess any of these when entering.

15. Visitors will not be passed to the Warden's Office without prior clearance from that office. They will pass through the metal detector before being passed to the Warden's Office.

16. Visitors will not carry cameras, tape recorders, purses, bags, briefcases, or similar objects onto the prison grounds. They may take money, identification, loose cigarettes and necessary personal medication. All items carried by the visitor will be shown to the Officer at the metal detector for his inspection. If the items are difficult to search or if they fail to pass the metal detector, the visitor will be instructed to remove them from the grounds. Visitors should also avoid wearing articles of clothing or jewelry that contain metal.

17. No person will be permitted to visit with more than one (1) inmate of the California Department of Corrections unless said person is a member of the immediate family of both inmates.

18. Inmates in Segregation, Isolation, Adjustment Center or on hospital status will be allowed to receive one (1) visit per week from all sources, exclusive of Attorneys and investigators. Inmates on Isolation status will be limited to a one-half (½) hour visiting period. Exceptions will be made with the approval of the Mail and Visiting Lieutenant.

19. A member of the bar will be permitted to interview an inmate client with the consent of the

inmate, during normal visiting hours, subject to institutional regulations. Recording of interviews by tape recorders or other voice recording equipment will not be permitted, nor will cameras be allowed. Investigators for an Attorney of Record will be confined to not more than two (2). Such investigators will be either a member of the Bar or a California State Licensed Investigator. Designation shall be in writing.

20. Press and other media interviews with specific individual inmates will not be permitted.

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed April 27, 1972]

[Caption Omitted in Printing]

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS COMPLAINT

I

The motion for preliminary injunction should be denied because the relief which it seeks preliminarily is the same equitable relief which is sought by way of a permanent injunction.

> "It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963).

The relief here sought by plaintiffs, like that erroneously granted in the foregoing case, would not preserve the status quo, but completely change it. For that reason, *inter alia*, we submit that such relief may not properly be granted by way of preliminary injunction.

II

Plaintiffs will doubtless place heavy reliance on the slip opinion in the very recent case of *Washington Post Co. v. Kleindienst*, No. 467-72 (D.D.C. 1972), wherein Judge Gesell granted an injunction against enforcement of federal prison rules similar to those at issue here. This is the first and only case from any jurisdiction holding that there is any federal right whatever to interviews between media representatives and prisoners. It contrasts sharply with the decisions of other federal court of equal dignity—*Seale v.*

Manson, 326 F.Supp. 1375 (D. Conn. 1971) and *Smith v. Bounds,* No. 2914 Civil (E.D.N.C. 1972). By no stretch of the imagination can *Washington Post* be deemed binding upon this Court, which is obliged to give these three conflicting cases only such weight as their inherent persuasiveness may warrant.

We submit that *Smith* is highly persuasive. The court there noted, correctly, that there is no authority holding that the First Amendment confers any rights of physical contact between inmates and the media. It noted further that the granting or denial of such interviews was a matter of internal prison administration over which the court had no jurisdiction. It was pointed out that

> "If ever a matter was repleat [*sic*] with overtones of internal affairs and discipline, this one is. The potential harm in the area of smuggling contraband both in and out of the Prison, the apparent difficulties and headaches in arranging times and facilities for such interviews, the problems in assuring proper security for the visiting members of the press, and many other problems make it clear that North Carolina's adoption of a general rule against such interviews is justified." pp. 3-4.

The *Washington Post* case finds, without the support of either authority or reasoned analysis, the existence of a First Amendment right on the part of both inmates and the media which, it concludes, may be vindicated only by allowing them to meet for the purpose of interviews. In manufacturing such a First Amendment right out of whole cloth, Judge

Gesell purported to rely upon the celebrated dictum that "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard,* 143 F.2d 443, 445 (9th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). Assuming the general validity of this dictum, it does not aid plaintiffs. It will, we trust, not be disputed that one of the rights a prisoner loses is that of freedom of travel. What First Amendment rights he may possess are not subject to exercise by means of leaving the prison and meeting the press. And we had thought it equally beyond dispute that there is no right of public access to prisons. Any access of the public to prisons in general or to particular inmates is at the sufference of the prison authorities. *Cf. Labat v. McKeithen,* 371 F.2d 757 (5th Cir. 1966). Authorities commonly allow access by relatives, spiritual advisors, and others, but as a matter of grace, not constitutional mandate. The control or, if need be, denial of access to prisons is a necessary concomitant of a warden's power and duty to maintain the security of the institution under his charge. If the public as a whole has no right of access to penal institutions, we are at a loss to see how such a right of access may be found on the part of the esteemed members of the Fourth Estate, who, in modern society, have a legal status no greater than or no different from that of any ordinary citizen. Any citizen may exercise his First Amendment right to write and publish; the fact that he may do so regularly or professionally does not give him a con-

stitutional right of news gathering superior to that of the ordinary private citizen.

At any rate, *Washington Post* is distinguishable. The Court there relies, at least in part, upon what it characterizes as an "overriding factor": "The great bulk of federal prisoners, perhaps as many as ninety percent, are incarcerated for non-violent crimes." Slip opinion, p. 7. Rather the opposite is true in California. The prisons of this state are rapidly decreasing in population, because of expanded community-treatment (jail, probation, and parole) programs. Because violent inmates are generally ineligible for these non-prison programs, inmates who are prone to violence or incarcerated for violent crimes represent the majority, and an increasingly large percentage, of all California prison inmates. Clearly then, some of the considerations relied upon by Judge Gesell are not present in the instant case.

We submit that, in light of the authorities cited herein and in the two previous memoranda we have filed, there is no federal right of interviews between California prison inmates and the press, and that the complaint should therefore be dismissed.

III

Although the question of abstention has not heretofore been raised by defendants, we seek leave of the Court to raise it now.

As the Court is aware, issues similar to those now before this Court are pending before the California Court of Appeal in *Yarish, et al. v. Nelson,* 1 Civ. No. 30188. In *Yarish v. Nelson,* No. C-71 1866 SW, this Court, in its order of November 18, 1971, dismissed without prejudice a complaint challenging the rules challenged in the instant proceeding, because of the pendency of the state case. We urge the Court to do the same thing here.

Although exhaustion of state remedies is not a prerequisite for the bringing of a civil rights action in federal court, considerations of comity and federalism require, or at least permit, a federal court to decline jurisdiction of a claim pending before a state court. *Cf. Younger v. Harris,* 401 U.S. 37 (1971). Only the most compelling and urgent considerations would justify the damage to federalism engendered by federal preemption of an issue currently pending before a state court. Whether to exercise the extraordinary power of mandatory injunction is discretionary, and we submit that in the circumstances of the instant case, that discretion should be exercised, as it was in *Yarish,* in favor of abstention.

We originally failed to raise abstention because of lack of identity of the parties in this and the state case. On further reflection, however, we have concluded that this lack of identity poses no barrier to invocation of the abstention doctrine. There is, of course, one common defendant, L. S. Nelson, in each action. More importantly, the actions are essentially the same, despite the lack of identity of plaintiffs,

since the issue is the same; whether the Department of Corrections regulations governing prison interviews are valid. And there is no dearth of available plaintiffs willing to assert exactly the same claims. Not to abstain here would permit circumvention of the abstention doctrine, since one group of plaintiffs could proceed in state courts and another in the federal courts, giving essentially the same class of persons two contemporaneous avenues for litigating the same issues—and two shots at the same result.

Abstention would be particularly appropriate in the instant case, since it was brought as a class action on behalf of all San Quentin prisoners and all media persons affected by the rules in question—a class including the individual plaintiff in *Yarish*. Although this Court has not yet determined whether this action shall be maintained as a class action, it would seem that plaintiffs, who are willing to submit it as such, should be bound by, and subject to the same abstention rules as, the member of their class who first brought litigation raising the same issue in this Court.

We therefore submit that this Court should defer decision in this matter pending resolution of the issues in the courts of California.

Conclusion

For the foregoing reasons, and others previously presented to this Court, defendants respectfully submit that plaintiffs' motion for preliminary injunction be denied and the complaint dismissed, or that de-

cision be deferred pending determination of the pending state-court appeal.

Dated: April 27, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General-Criminal Div.
Doris H. Maier, Assistant Attorney
General-Writs Section
Karl S. Mayer
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Atorneys for Defendants

GRN:jkh
SF CR
019920

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed May 2, 1972]

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The function of this document is solely to respond to plaintiffs' memorandum filed April 27, 1972. It will be very brief, as most of plaintiffs' arguments are fully answered by our memorandum filed the same date.

Although it hardly seems necessary to note, we did not intend to characterize plaintiffs' complaint as asserting a right on the part of news media to interview nonconsenting inmates. We do think it fair, however, to characterize the complaint as asserting a right on the part of news media to interview any consenting inmate, and a concomitant right on the part of inmates to be interviewed by consenting newsmen, without regard to the interests of prison officials in the security of the institutions, and the men in them, for which they are responsible.

Plaintiffs' demand for a preliminary injunction is particularly ludicrous in view of the breadth of the injunction they seek and their own assertion that the complaint may not be dismissed on motion because there has been no examination of "the political and sociological structure of the prison population" with a view to proving "the causal connection between an

inmate becoming a leader because of his press access." Plaintiffs' memorandum, p. 5. We submit that plaintiffs' apparent concession that our position may be valid if backed up by evidence is fatally inconsistent with their contemporaneous insistence on issuance of a preliminary injunction, drastically altering, rather than preserving, the status quo, without the production or offer of evidence.

Plaintiffs accuse us of misstating the applicable law regarding First Amendment rights of prisoners by stating that these rights are clearly subject to limitation in the light of reasonable state interests. Plaintiffs assert that we must demonstrate a "compelling state interest" and imminent danger of its breach; "reasonable limitations are not sufficient where First Amendment rights are at stake." Plaintiffs' memorandum, p. 4. Rather, it is plaintiffs who misstate the law, and we who state it accurately. It is true that reasonable limitations may not suffice when the First Amendment rights of free citizens are threatened with infringement. But plaintiffs' own authorities show that the rights of prisoners are narrower and capable of restriction upon a lesser showing. For example, *Nolan v. Fitzpatrick,* 451 F.2d 545, 548 (1st Cir. 1971), speaks of restrictions which further "an important or substantial governmental interest." And *Carothers v. Follette,* 314 F.Supp. 1014 (S.D.N.Y. 1970), would have upheld actions which were "reasonably and necessarily related to prison security or the prisoner's rehabilitation." We submit that the court in *Carothers* adopted the correct view when it concluded that "if the state had given some explanation . . . that indicated the action was reasonably and

necessarily related to prison security or the prisoner's rehabilitation, we would be reluctant to interfere with its internal administration and regulations." *Id.* at 1024. We have done more than "indicate" the reasonable and necessary relationship between the rules in question and prison security, and submit that this Court should give the deference indicated in *Carothers* to the experienced judgment of the Director of Corrections. Reasonableness is the test, and we have met it.

Conclusion

For the foregoing reasons, and those previously set forth, we respectfully submit that the motion for preliminary injunction should be denied and the complaint dismissed.

Dated: May 2, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—
Criminal Division
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:jkh
SF CR
019920

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Oct. 4, 1972]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT AND ORDER; REQUEST FOR ORDER SHORTENING TIME; REQUEST FOR STAY OF INJUNCTION PENDING HEARING

To: Richard Doctoroff and Patti Roberts, Counsel for Plaintiffs:

Please Take Notice that defendants will move this Court, on the date and time specified in the attached Order Shortening Time, in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California 94102, for an order vacating the Judgment and Order of this Court, filed September 29, 1972. Defendants herewith request an order shortening time and a stay of this Court's Judgment and Order pending hearing on said motion.

This motion and these requests will be based upon all the records and files in the above entitled matter,

as well as on the memorandum of points and authorities and proposed orders attached hereto.

Dated: October 3, 1972

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:bg
SF CR
019920

Points and Authorities

On September 29, 1972, this Court issued a judgment and order declaring California Department of Corrections Administrative Manual Paragraph 415.071 unconstitutional, enjoining its enforcement, and requiring defendants to submit, within 90 days, a draft order on the subject of inmate-media interviews, consistent with the Court's opinion.

Defendants respectfully move this Court to vacate the judgment and order, as it appears that a single United States District Judge lacks jurisdiction to enter any order enjoining the enforcement of this or any other regulation of the Director of Corrections, having statewide applicability.

It is settled law that a regulation of the California Director of Corrections, having statewide applicability, is treated as a state statute for purposes of determining the applicability of 28 U.S.C. § 2281 (the three-judge court statute). Accordingly, only a three-judge district court has jurisdiction to enjoin the enforcement of such a regulation. *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969). *See also Younger v. Gilmore,* 404 U.S. 15 (1971), holding that the Supreme Court had jurisdiction to hear an appeal from the three-judge district court convened pursuant to *Gilmore v. Lynch, supra,* and thus inferentially approving that decision. Both *Gilmore* and the instant case involved Administrative Manual provisions of statewide applicability. It is therefore clear that only a three-judge district court would have jurisdiction to enjoin their enforcement.

Defendants have at all times believed and maintained, in our pleadings and proposed orders, that the complaint failed to raise a substantial federal question. A single district judge has jurisdiction to dismiss a complaint which does not raise a substantial federal question, even if all the other requirements for a three-judge district court are met. *California Water Service Co. v. City of Redding,* 304 U.S. 252 (1938); *Ex parte Poresky,* 290 U.S. 30 (1933). Consequently, we did not earlier plead the requirement of a three-judge district court. Our failure to do so does not, of course, constitute a waiver of the requirements of 28 U.S.C. § 2281, since those requirements are jurisdictional, and even a stipulation of the parties will not confer jurisdiction

upon a single judge to hear a complaint which must be determined by a court of three judges. *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930); *Riss & Co. v. Hoch*, 99 F.2d 553 (10th Cir. 1938).

Since this Court did not concur with our view that the complaint failed to raise a substantial federal question, a three-judge court should have been convened.

Under our interpretation of the Judgment and Order, defendants have 90 days to submit new regulations governing inmate interviews to this Court, and in the meantime are not obliged to allow inmate interviews. However, we recognize that the Order is susceptible of the interpretation that defendants must immediately allow inmate interviews to all comers, pending submission and approval of new regulations. If the latter interpretation reflects the intent of the Court, we request that the Order be stayed pending hearing on the motion to vacate. Since the Judgment and Order were entered without jurisdiction, we submit that the stay should issue. We also request an order shortening time for hearing on the motion, so that defendants will not be impaired in performance of their duty to maintain prison security, pending hearing on the motion.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court was without jurisdiction to enter the Judgment and Order filed September 29, 1972. Defendants therefore move that the Order be

vacated and suggest that this Court request the Chief Judge of this Circuit to convene a three-judge district Court.

Dated: October 3, 1972

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:bg
SF CR
019920

United States District Court
Northern District of California

[Caption Omitted in Printing]

CERTIFICATE OF COUNSEL IN SUPPORT OF REQUEST FOR ORDER SHORTENING TIME

George R. Nock, Deputy Attorney General of the State of California, certifies to the following:

I am counsel for defendants in the above-entitled matter. I am informed and believe that if it is the

intent of this Court that the Judgment and Order entered on September 29, 1972, requires defendants to allow interviews between the media and inmates under the control of defendants, said defendants will be impaired in the performance of their duties to maintain prison security. I therefore request that defendants' motion to vacate be heard as soon as possible, and that time for hearing therefore be shortened.

I have conversed this day by telephone with Richard Doctoroff, Esq., counsel for plaintiffs, and have been informed by him that he will be unable to appear at such a hearing at any time during the balance of this week, but that he could appear during the week of October 10, 1972. It is my belief that Mr. Doctoroff would stipulate to a hearing date during the week of October 10, 1972. I therefore request that the hearing be set for that week.

Dated: October 3, 1972

/s/ George R. Nock
George R. Nock

[Proposed Order and Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Nov. 13, 1972]

[Caption Omitted in Printing]

MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

Plaintiffs in the above entitled action move this Court for an order directed at Defendants to show cause why they should not be punished for contempt of this court upon the grounds set forth in the affidavit of Richard M. Doctoroff, the order to show cause, and the contempt order all attached hereto, and made a part hereof.

Richard M. Doctoroff
Attorney for Plaintiffs

November 13, 1972

United States District Court
Northern District of California

[Caption Omitted in Printing]

ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

Good cause appearing, It Is Hereby Ordered that Raymond K. Procunier, Louis S. Nelson, James W. L. Park and Joseph O'Brien be and appear in their own proper persons before this Court in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California at

..... on the ..... day of November 1972, or as soon thereafter as counsel can be heard, to show cause, if any they have, why they and each of them should not be punished for contempt of court for violating and disobeying the orders of this Court signed September 28, 1972 and October 31, 1972, by refusing to permit named plaintiff prisoners and media to interview at San Quentin Prison, by refusing permission to other prisoners and media from interviewing at prisons of the California Department of Corrections, and by publishing regulations and rules that are contradictory and violative of the orders and opinions of this Court.

It is further Ordered that service of this order to show cause may be made on or before the ..... day of November 1972, by serving the above mentioned defendants herein or their attorneys copies of this order to show cause together with a copy of the affidavit in support thereof attached thereto.

Dated: November ....., 1972

.....

United States District Judge

AFFIDAVIT OF RICHARD M. DOCTOROFF*

State of California
City and County of San Francisco } ss.

Richard M. Doctoroff, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs in the above entitled action.

2. On or about September 28, 1972 this Court rendered a judgement permanently enjoining enforcement of Section 415.071 of the California Department of Corrections Administrative Manual which prohibited interviews between prisoners and media representatives. At the same time the Court entered a declaratory judgement declaring said regulation to be invalid as a violation of the First Amentdment, and the Court ordered that the Defendants submit a proposed rule consistent with the opinion of the Court within 90 days.

3. On October 2, 1972 Plaintiff Eve Pell telephoned San Quentin Prison soon after she learned of the favorable order in order to arrange to interview Plaintiff John Larry Spain. Officials at San Quentin indicated that they would not allow the interview to take place despite the existance of the Court's order.

4. I then contacted Mr. George Nock, attorney for the Defendants to indicate the problem that Ms. Pell was having arranging the interview. He told me that he was planning to move for an order vacating the judgement on jurisdictional grounds and he would

*Misspellings in original.

attempt to have the judgement stayed until a hearing could be held on defendants' motion to vacate. He indicated that Defendants would not comply with the order at least until the request for a stay was ruled upon.

5. On October 4, 1972 an order shortening time was signed by the Court setting the time for hearing on the defendants' motion to vacate on October 11, 1972. At the same time the Court refused to sign the Order Staying the Injunction, indicating to plaintiffs and their counsel that the order was in effect and should be obeyed.

6. Between the time when the case was set for hearing on October 4, 1972 and the hearing that took on October 11, 1972 I made numerous requests to Mr. Nock to arrange for at least the named plaintiffs to be permitted to interview at San Quentin. He continually repeated that the Department was working on interim regulations and they would be ready within "a day or two", and visits could commence when they were prepared. No visits had taken place when the motion to vacate was heard on October 11, 1972 nor have they at this date more than a month later.

7. During the period after the Judgement was signed on September 28 and the hearing on October 11, I received numerous complaints from media people who called San Quentin Prison to arrange for interviews and prison officials refused even to acknowledge the existance of the Courts order. Alice Yarish of the Pacific Sun in San Raphael and Mark Schwartz of KPFA radio in Berkeley were press people who

attempted repeated to get into San Quentin to see prisoners and they were turned away during this period.

8. At the hearing on October 11, 1972 when the Court indicated that he would replace the order granting a permanent injunction with a temporary restraining order, counsel for the defendants, Mr. Nock represented to the Court that officials of the Department of Corrections were meeting that very day to formulate interim regulations that complied with the earlier opinion of the Court. Mr. Nock indicated that the regulation would be sent to the various prisons by the end of that same day and interviews would be permitted almost immediately. The interim regulations were not finally received by counsel for plaintiffs until November 10, 1972 one month later. During the interim there was no compliance with the order of the court nor is there yet compliance.

9. On October 31, 1972 this Court issued the temporary restraining order that was requested at the October 11 hearing thereby replacing replacing the permanent injunction that had been in force until that time. That restraining order was to be effective "upon receipt". When I received the Order of October 31, from the Court, I immediately telephoned Mr. Nock to inform him of the new order and again request access for plaintiffs, on or about November 2, 1972. Mr. Nock again represented that the new rules were forthcoming and access would be very soon.

10. Complaints from media representatives continued to be received by me and my office indicating that the prison still refused to acknowledge the very

existance of the Courts' order. These included additional complaints from the aforementioned Alice Yarish and Mark Schwartz.

11. On November 9, 1972 I visited prisoners at San Quentin Prison and upon leaving the prison I requested a copy of the new Visiting Regulations which had been prepared (See Attachement). Paragraph 17 of those regulations dated November 1, 1972 seems to be in flagrant violation to all orders of this Court entered in this case and contradictory to all representations made by defendants through their counsel to the Court and plaintiff counsel. This item is a verbatim repeat of Department of Corrections Administrative Manual Section 415.071 which has been enjoined by order of this Court. Even if this rule of November 1, 1972 is superceded by other departmental regulations the flagrant disregard of the Courts order in this specific instance should be punished and defendants should be ordered to notify all persons who may have received the illegal notice of November 1, 1972 that media visits are permitted by order of this Court. Unless such notification is ordered and the Regulations of November 1 are restrained from further circulation in their existing form visits between press and prisoners at San Quentin will be greatly deterred.

12. After I read the November 1 San Quentin regulations I spoke to Mr. Nock on the telephone on November 9 indicating my anger at the defendants for breeching any good faith that may have existed by framing such a rule. Mr. Nock stated that he was meeting with Mr. Procunier, defendant Director of

Corrections, to discuss the problem and that he would telephone me Friday November 10, 1972 to indicate the results of his conference. No phone call was received from Mr. Nock or any other person representing defendants on that day. At the same time Mr. Nock stated that the interim press regulation prepared by the Department of Corrections had been mailed to me that very day; he also expressed the belief that plaintiffs probably would not be satisfied with the new rules since they were somewhat restrictivve. At the conclusion of that telephne call I indicated to Mr. Nock that in light of the fact that none of the plaintiffs had been granted the relief ordered by the Court and even he believed that the new rules would not be acceptable to plaintiffs, plaintiffs would probably begin contempt proceedings the beginning of the week of the 13th November.

13. On November 10, 1972, I finally received a copy of the interim rules regarding media interviews, entitled—Administrative Bulletin No. 72/40 (See attachment), dated November 6, 1972. On their face the regulations limits media visits to such an extent that five of the named plaintiffs in this action would not be allowed to have press visits if the new rules were allowed to be enforced. Plaintiff Eve Pell is a free lance writer and editor; plaintiff Betty Segal reports for a monthly newspaper. Neither of them comes within the definition of "News Media Representative . . . a full-time reporter for recognized and regularly published news magazines such as *Time* and *Newsweek*, general coverage daily newspapers (published at least five time a week), and daily news

programs of radio and televisions." That paragraph would also prevent plaintiff Booker T. Hillery from speaking to agents of publishers for the purpose of manuscript publication, and prevent plaintiffs Bobby Bly and John Larry Spain from having interviews with Betty Segal and Eve Pell respectively. The blanket proscription against media interviews with prisoners in isolation or segregation would bar plaintiff Spain from having media interviews with any press. Defendant Procunier who issued the new regulations was fully on notice of the status of all plaintiffs of this lawsuit. For him and other defendants to issue regulations that would be so limiting so as to exclude named plaintiffs appears to be in acting in completely bad faith and in contempt of the orders of this Court.

14. Besides excluding the named plaintiffs the new regulations are defective in several other respects:

a/ language stating "Interviews with specific inmates may be prohibited at those times in which such interviews, in the judgement of the warden or superintendant, would jeopardize the current safety of the institution, and at those times in which such interviews would be detrimental to the welfare and best interests of the inmate," is so vague as to undercut the entire value of the opinion of the court and gives the wardens carte blanche power to subvert any of the other language of the new regulations that seem to allow media visits.

b/ Special classification for prisoners received from court or returned on parole appears to be discriminatory and violative of the equal protection

clause unless the defendants can sustain the burden of showing a compelling state interest for this extraordinary categorization. I can conceive of of no more compelling reasons for disallowing these prisoners from having press visits than any other prisoner, and because of their status of having only recently arrived at prison their stories may have even more newsworthiness than the average prisoner in light of their recent court experiences.

c/ limitations regarding consent of attorneys, co-defendants, and criminal courts while ostensibly for the protection of the prisoners can and will be used by the prison officials to obstruct media interviews. Had this Court deemed it necessary to limit media interviews in this manner it had the power to do exactly that, but it declined to do so and left the element of consent to the prisoner him or herself.

d/ Limitation of one visit with media for any six month period for a specific prisoner except with special permission appears to totally shift the proper burden regarding time and space requirements at the expense of a prisoners First Amendment rights. Until the defendants are able to show that a prisoners media visits interferes with a compelling state interest, such an arbitrary limitation should not be allowed to exist.

e/ Language calling for the possibility of imposition of "cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview," can be implemented by prison officials to essentially tax the new gathering

activities of the press and corresponding limit the freedom of speech of prisoners. It is hard to imagine a more extreme situation as one in which prisoners and media have to pay for guards so that they can excercise their First Amendment rights.

f/ Although media interviews with psychotic prisoners is unlikely to be a normal occurance, the blanket proscription against such visits should be voided since defendants have hardly evidenced why psychotics visiting with media would be inconsistant "with prison safety and discipline," to use the words of the order of October 31, 1972. There are many types of psychosis and until there is a showing in a specific case that such a visit would create a problem, psychotics too should have equal access to be heard. The media do not need prison officials to act as guardians and determine who is sane enough to be visited, and are capable of making their own determination.

15. Plaintiffs and their counsel have been extremely patient with defendants and their counsel and believed them to be operating in an atmosphere of good faith. In view of the fact the original judgemeant in this case was rendered over six weeks ago, we believe we believe that we have shown extreme reluctance in utilizing the extraordinary contempt power of this Court. We can be patient no longer and seek assistance of the Court to have effective compliance with its orders.

Richard M. Doctoroff

[Jurat Omitted in Printing]

San Quentin
November 1, 1972
[Attachment One]

Visiting Privileges

1. Receiving visits is a privilege and is subject to restriction: (1) if the safety and order of the institution is threatened and (2) if the relationship may be harmful to the inmate, the applicant or any other person.

2. Visiting Hours: Monday, Thursday, Friday 8:00 A.M. to 3:00 P.M. Saturday, Sunday, Holidays 8:00 A.M. to 2:00 P.M.

   No Visiting On Tuesday and Wednesday

   No visits are permitted on New Year's Day because of special activities. On certain days, such as Good Friday and the days preceding Christmas and New Year's Day, the Visiting Room will close one (1) hour early (on week-days). In the event the institution should be in a state of unrest, visiting privileges are subject to cancellation.

3. Inmates may receive visits from 10 approved persons. Exceptions to this procedure can be considered for programs or persons approved by the Administration. Two (2) of the ten (10) visitors will be allowed four (4) visits per month and the others, one (1) visit per month. The inmate will make this designation in writing to the Mail and Visiting Lieutenant. No person under eighteen

(18) years of age may visit unless he/she is a member of the inmate's immediate family, or unless accompanied by an approved visitor of the inmate who is over eighteen (18) years of age. The visiting period will be one (1) hour in duration. Any extension or limitation will be made by the Mail and Visiting Lieutenant on facts presented to him.

4. Inmates who wish to place visitors on their visiting card will send a completed CDC-105 form in a letter to the prospective visitor, and the mail room will remove the CDC-105 and substitute a blank CDC-106. On completion of the CDC-106, the prospective visitor should mail it with a letter to the inmate. The mail room staff will remove the completed CDC-106 and forward it to the Mail and Visiting Lieutenant for processing. If facts don't agree, the parties will be notified and clarification will be requested before visiting will be permitted.

5. Four (4) people will be allowed on the grounds to visit an inmate at one time. If there are more than four (4) in the party, the visiting hour must be divided among them.

6. Visits from former inmates of any penal institutions or from persons involved in or convicted of any type of narcotics offense are prohibited, except by special permission of the Warden. A visitor who is on probation or parole must also have the permission of his parole or probation supervisor to visit.

7. No male visitor wearing black or blue jeans will be permitted to visit.

8. Visitors are not permitted to leave money or any other articles at the institution for an inmate, nor are they allowed to take anything from the inmate.

   Money must be sent in through the mail, by Post Office money orders; must be made payable to the Department of Corrections; and must indicate the register number and name of the inmate for whom intended.

9. Anyone entering the Institution grounds is subject to being checked through the metal detector, and whenever deemed necessary, the Warden or his authorized representative may order the searching of anyone who enters the Institution grounds. Persons refusing such search will be denied entrance. Fingerprinting or photographs may also be requested as a further means of identification. If a person refuses to be fingerprinted, admission will be denied.

10. All persons entering the Institution grounds will carry valid identification in their possession. Example: California State Department of Motor Vehicles identification card or a Drivers License. If a person does not possess valid identification, he/she will be denied entrance. Out-of-state visitors will have their identification carefully checked.

11. Bringing firearms, explosives, alcoholic beverages, benzedrine or drugs on the prison grounds consti-

tutes a felony. Visitors must be sure they do not possess any of these when entering.

12. Visitors will not be passed to the Warden's Office without prior clearance from that office. They will pass through the metal detector before being passed to the Warden's Office.

13. Visitors will not carry cameras, tape recorders, purses, bags, briefcases, or similar objects onto the prison grounds. They may take money, identification, loose cigarettes, and necessary personal medication. All items carried by the visitor will be shown to the officer at the metal detector for his inspection. If the items are difficult to search, or if they fail to pass the metal detector, the visitor will be instructed to remove them from the grounds. Visitors should also avoid wearing articles of clothing or jewelry that contain metal.

14. No person will be permitted to visit with more than one (1) inmate, unless said person is a member of the immediate family of both inmates.

15. Inmates in Segregation, Isolation, Adjustment Center or on hospital status will be allowed to receive one (1) visit per week from all sources, exclusive of attorneys and investigators. Inmates on Isolation status will be limited to a one-half (½) hour visiting period. Exceptions will be made with the approval of the Mail and Visiting Lieutenant.

16. A member of the Bar will be permitted to interview an inmate client with the consent of the in-

mate, during normal visiting hours, subject to institutional regulations. Tape recorders or other voice recording equipment or cameras will not be permitted. A cassette-type recorder will be furnished by the Institution. The attorney will supply the cassette. Investigators for an attorney of record will be confined to no more than two (2). Such investigators will be either a member of the Bar of California or a California State licensed investigator. Designation shall be in writing.

17. Press and other media interviews with specific individual inmates will not be permitted.

[Attachment Two]

State of California
Department of Corrections
Sacramento 95814

November 6, 1972

Administrative Bulletin No. 72/40

To: Wardens and Superintendents; Deputy Directors; and Staff Members

Subject: News Media Interviews with Specific Inmates

This temporary order covering news media interviews with specific inmates is issued under compulsion of federal court order and will remain in effect until cancelled or replaced by a permanent order.

News media representative is defined as a full-time reporter for recognized and regularly published news

magazines such as *Time* and *Newsweek,* general coverage daily newspapers (published at least five times a week), and daily news programs of radio and television stations.

Interviews with specific inmates are defined as interviews by news media representatives with inmates specified by name.

Administrative Manual Section 415.071 is temporarily amended as follows:

News media representatives may be permitted to interview a specific inmate if the inmate wishes it under following conditions:

Interviews with specific inmates may be prohibited at these times in which such interviews, in the judgment of the warden or superintendent, would jeopardize the current safety and good order of the institution, and at those times in which such interviews would be detrimental to the welfare and best interests of the inmate. Interviews with inmates who are psychiatrically diagnosed as psychotic are prohibited.

Interviews with specific inmates will not be permitted during times in which such inmates are in isolation or segregation, or for a reasonable time after they are received from court or returned from parole. If an inmate is awaiting trial, such interview may be permitted only (1) with consent of the inmate's attorney, (2) if the inmate has no attorney, with consent of the court, (3) if the inmate is a co-defendant, after notice to the co-defendants and their counsel of court, (4) if the court has imposed a gag rule in the case,

with specific approval of the court as expressed by minute order.

Interviews with a specific inmate will be permitted only once in any one month period for any individual inmate, unless otherwise approved by the Director.

Interviews must be approved by the warden or superintendent and be requested by one week in advance in writing. Interviews will be arranged to be conducted during regular institution hours if possible. All interviews will be conducted under such conditions as the institution head may deem appropriate, including restrictions as to time, place and length of interviews, size of film crew, and any other factors related to the interview. There will be no cameras or recording equipment used without the specific advance approval of the warden or superintendent. Plans for the use of electrical equipment will be submitted with the original request one week in advance. News media may be required to pay for the cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview.

Please see that all personnel are informed of the contents of this bulletin.

/s/ R. K. Procunier
R. K. Procunier
Director of Corrections

United States District Court
Northern District of California

[Filed November 15, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD M. DOCTOROFF IN FURTHER SUPPORT OF MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT.

State of California
City and County of San Francisco—ss.

Richard M. Doctoroff, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs in the above entitled action.

2. Prior to filing of the original complaint in this action plaintiff Booker T. Hillery requested the right to be interviewed by publishers of *Earth Magazine* when that request was denied the action was filed *in propria personem* because of defendants' refusal to fulfill his request and allow the interview to take place.

3. Prior to filing the amended complaint in this action each of the additional prisoner plaintiffs in this action made requests to be interviewed by the media plaintiffs in this action. When those requests were denied by the defendants, plaintiffs represented by counsel filed the amended so that the request for interview could be realized.

4. Since the amended complaint has been filed almost all negotiation involved with this action has

been accomplished through counsel and there has been virtually no contact between the plaintiffs and defendant regarding the matters concerned in this lawsuit.

5. Since the Court's orders of September 28, 1972 and October 31, 1972 I personally have been negotiating with Defendants' attorney, George Nock so that prisoner plaintiffs and media plaintiffs will be able to realize the interviews that they originally sought in the complaint, but this has achieved no results to this date and the prisoners requests to be interviewed by the media is still unfulfilled. Plaintiff prisoners requests for interviews with specified media persons must be considered to have been in effect from before the filing of this action and any renewal of these requests required by this Court should be considered to have been made by counsel in the course of negotiating the implementation of the orders of this Court.

6. Since this Court has entered orders on September 28, 1972 and October 31, 1972, Mark Schwartz, a fully credentialed reporter from radio station KPFA in Berkeley has received written request to visit four prisoners at San Quentin Prison and has been allowed to see none of them. Although Mr. Schwartz has letters requesting interviews with plaintiff, John Larry Spain, and prisoners Larry Justice, Luis Talamantez, and Robert Eikner, in a letter dated October 31, 1971 from defendant Warden Louis Nelson and in a phone conservation on November 10, 1972 with defendant Associate Warden James Park,

Mr. Schwartz was told that these prisoners did not have a right to be interviewed by media because they were in the Adjustment Center.

7. Unless this Court issues an order to show cause why defendants should not be held in contempt, the orders of this Court will be emasculated by the new Departmental regulations that would continue to prevent prisoner plaintiff from being able to speak to members of the press.

Richard M. Doctoroff

[Jurat Omitted in Printing]

In The United States District Court
For The Northern District of California

[Filed November 21, 1972]

[Caption Omitted in Printing]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

To the Honorable Oliver D. Hamlin, Jr., United States Circuit Judge, and the Honorable William G. East and Spencer Williams, United States District Judges, and to Richard Doctoroff, Esq., and Patti Roberts, Counsel for Plaintiffs:

Defendants hereby move this Court for an order dissolving the temporary restraining order, issued by Judge Williams on November 1, 1972, which restrains the enforcement of California Department of Corrections Administrative Manual Paragraph 415.071.

Defendants urgently desire a ruling on this motion. Recognizing the difficulties inherent in assembling the three judges, defendants will waive any right to a hearing before the court assembled. If the Court desires or opposing counsel demands a hearing, defendants urge that it be held at the earliest possible time, and waive any time requirements for such a hearing.

This motion is based on all the records and files in this case, and upon the memorandum of points and authorities and proposed order attached hereto.

Dated, November 20, 1972.

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General
George R. Nock
Deputy Attorney General

GRN:bg
SF CR
019920

Points and Authorities

On November 8, 1971, plaintiff Hillery filed a complaint, in propria persona, seeking money damages for allegedly having been refused permission to receive a visit from editors of Earth Magazine, to whom plaintiff Hillery had allegedly submitted an article

for publication. Ine due course, counsel was appointed and on March 9, 1972, filed an amended complaint and motion for preliminary injunction. New plaintiffs and defendants were added in the amended complaint, and it was alleged that defendants, all officers of the California Department of Corrections, had refused to allow plaintiffs, prisoners and persons alleged to represent the media, to interview one another. Defendants moved to dismiss the complaint and opposed the motion for preliminary injunction, defending in part upon the basis that Administrative Manual Paragraph 415.071, which defendants argued to be constitutional, prohibited interviews between the media and specific inmates. This defense did not run to plaintiff Hillery; the refusal to extend visiting privileges to the editors of Earth Magazine was not based on Paragraph 415.071. Such a visit was not considered a media interview, but a special purpose visit, for which no showing of need was made.

The motions were heard and the matter submitted in May, 1972.

On September 29, 1972, Judge Williams filed an order granting a permanent injunction against the enforcement of Paragraph 415.071 and requiring defendants to submit within 90 days new regulations governing prisoner-media interviews.

On November 1, 1972, on motion of defendants, this order was vacated on jurisdictional grounds. Judge Williams notified the Chief Judge that the matter was one required to be heard and determined by a court of three judges. On the same date, Judge

Williams entered an order temporarily restraining the enforcement of Paragraph 415.071. It is this temporary restraining order which we now ask this Court to dissolve.

Following issuance of the permanent injunction on September 29, 1972, defendant R. K. Procunier, Director of Corrections of the State of California, began to prepare a set of emergency regulations governing inmate interviews with the news media, under compulsion of the permanent injunction. These regulations were published November 6, 1972. Their validity is now being questioned before Judge Williams. It is the position of defendants, however, that they are under no federal obligation to permit any interviews between inmates and news media personnel. The publication of the regulations, being under compulsion of court order, does not detract from this position.

I

An injunction against enforcement of United States Bureau of Prisons regulations indistinguishable from paragraph 415.071 having been stayed by the Supreme Court, the temporary restraining order should not have issued and should be dissolved.

In the case of *The Washington Post Co. v. Kleindienst,* No. 72-1362, United States District Court for the District of Columbia, plaintiffs sought injunctive relief against the enforcement of a regulation of the United States Bureau of Prisons which prohibited

interviews between members of the news media and individual inmates of the federal prisons. On April 11, 1972, the district court issued an order preliminarily enjoining the enforcement of the regulation. A copy of the opinion and order of the district court is a part of the file in the instant case, having been appended to Plaintiffs' "Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Preliminary Injunction," filed April 27, 1972.

After both the district court and the Court of Appeals for the District of Columbia Circuit denied the Government's motions for a stay pending an appeal, the request was brought before the Supreme Court. On May 12, 1972, by a vote of six to three, the Supreme Court ordered the preliminary injunction stayed pending appeal. 406 U.S. 912. We are informed by counsel for the Bureau of Prisons that said stay remains in effect.

The order of the Supreme Court gives no reasons for issuance of the stay, and it would be presumptuous of us to suggest what those reasons might be. But the regulations involved in *The Washington Post Co.* are indistinguishable from those involved in the instant case and are identical in their effect. No reason has been advanced why the United States Bureau of Prisons should be free to enforce their regulations while the ultimate question of the validity of the regulations is litigated, while the Department of Corrections of the State of California is forbidden to

enforce functionally identical regulations prior to even a preliminary adjudication of their validity by a court of competent jurisdiction. We therefore submit that deference to the Supreme Court's order requires dissolution of the temporary restraining order issued herein.

II

The temporary restraining order should be dissolved because it radically alters the status quo, rather than preserving it.

It is axiomatic that the sole proper function of a temporary injunction is to preserve the *status quo ante litem,* and that it is improper to use such an order to alter the status quo. *King v. Saddleback Junior College District,* 425 F.2d 426 (9th Cir. 1970); *Washington Capitols Basketball Club, Inc. v. Barry,* 419 F.2d 472 (9th Cir. 1969); *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 809 (9th Cir.), *cert. denied,* 375 U.S. 821 (1963); *Quon v. Stans,* 309 F. Supp. 604 (N.D. Cal. 1970). "The status quo is the last, uncontested status preceding the commencement of the controversy." *Washington Capitols Basketball Club, Inc. v. Barry, supra,* 419 F.2d at 476. This definition is clarified by examination of some of the other cited cases. In *King, supra,* plaintiffs were prospective students at a public college who were prevented from registering for classes because their hairstyles did not comport with the applicable college rules. A preliminary injunction was issued restraining defendants from enforcing these rules, thus allowing plaintiffs to register. Upon appeal by de-

fendants, it was held that the district court had abused its discretion in issuing the preliminary injunction, since the injunction altered, rather than preserved, the *status quo ante litem*. In *Quon, supra,* defendants had announced for some time their plans to do the acts complained of (conducting the United States census in a manner which plaintiffs contended violated the rights of Chinese-Americans), but had not yet implemented these plans. Temporary relief against such implementation was denied, the court holding that relief would "upset the situation as it has existed for some time, the last peaceable state of affairs prior to this controversy." 309 F.Supp. at 607.

Viewed in light of the above cases, the instant temporary restraining order was clearly improperly issued. Administrative Manual Paragraph 415.071 had been in force since August 23, 1971, nearly three months before the filing of the original complaint in this matter (which did not challenge this Paragraph) and nearly seven months before the filing of the first amended complaint. It was also in force more than fourteen months prior to the issuance of the temporary restraining order. By no stretch of the imagination could the controversy be deemed to have commenced prior to the filing of the original complaint. The "situation," which includes the existence and enforcement of Paragraph 415.071, had clearly existed for months before any controversy between the parties arose, and was thus "the last peaceable state of affairs prior to this controversy." *Quon, supra,* 309 F.Supp. at 607. The temporary restraining order

did not preserve the *status quo ante litem,* in which inmates could not have interviews with the media, but drastically altered it to require defendants, against their judgment, to permit such interviews. It is the ultimate twist of logic to argue, as plaintiffs have, that a temporary injunction merely restores the status quo.

The impropriety of the relief granted can be vividly demonstrated by comparison with a proper temporary restraining order. In *Gilmore v. Lynch,* Case 45878 in the files of this Court, defendants had issued a regulation requiring the removal of certain books from prison libraries, and the destruction of such books. A temporary restraining order quite properly issued to prevent such threatened removal and destruction pending adjudication of the validity of the regulation. The temporary restraining order was proper because it preserved the status quo and prevented threatened irreparable injury. The restraining order issued herein is improper because it radically alters the status quo and itself threatens irreparable injury. Defendant Procunier adopted the regulation in question herein because, in his judgment, it was necessary to the discipline and security of the institutions under his control. If this judgment is correct, the consequences of the restraining order can include any number of things, up to and including loss of life, which may be fairly characterized as "irreparable injury." We submit that an order so drastically altering, rather than preserving, the status quo may be properly issued, if at all, only by this three-

judge court itself, after thorough litigation of all the issues involved.

It has also been recognized that temporary injunctive relief should be denied where there is a serious dispute regarding the applicable law. *N. W. Controls, Inc. v. Outboard Marine Corporation,* 317 F.Supp. 698, 702 (D. Del. 1970). The existence of such a dispute herein is not difficult to establish. Apart from the now-vacated order issued by Judge Williams, only one case, *The Washington Post Co. v. Kleindienst, supra,* has held there is any federal right on the part of prison inmates to interviews with the news media. To the contrary are three cases from three different districts: *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971); *Smith v. Bounds,* No. 2917 Civil (E.D.N.C. 1972); and *Seattle-Tacoma Newspaper Guild v. Daggett,* Civil No. 9557 (W.D. Wash. 1972), *appeal pending,* No. 73-2330 (9th Cir.). Further, the issuance of the stay by the Supreme Court in the *Washington Post* case may give some indication that a majority of that Court has not been convinced of the soundness of the opinion of the district court in that case. The foregoing cases clearly show the existence of a dispute concerning the applicable law sufficient to preclude the granting of temporary injunctive relief.

III

The temporary restraining order is not supported by a sufficient showing of irreparable injury

A temporary restraining order issued by a single judge pending the convening of a three-judge district

court must be supported by a finding, based on evidence, that irreparable injury will result if the order is not issued. 28 U.S.C. §2284(3). Such a finding was made in this case. We submit, however, that it was not based on substantial evidence.

The finding was based entirely on the affidavit of Richard Doctoroff, plaintiffs' attorney, the body of which reads, in its entirety, as follows:

> "Richard M. Doctoroff, being duly sworn, deposes and says:
>
> "That I am the attorney for prisoner plaintiffs in the above-entitled lawsuit. My clients have repeatedly attempted to communicate with different authorized members of the news media in order to exercise their first amendment rights and to effectively communicate information concerning their confinement in San Quentin State Prison.
>
> "Unless the temporary restraining order is issued prisoner plaintiffs' constitutional rights will continue to be stifled. Irreparable damage has already occurred in that Booker Hillery's attempts to be interviewed by a member of the staff of Earth magazine is now impossible, in that the magazine is no longer publishing. If a temporary restraining order is not issued other information that is desired to be communicated may also be lost to time and other circumstances."

Upon the basis of the foregoing affidavit, the court concluded that the affidavit "states that the regulation continues to remain in force, and has prevented Plaintiff Hillery from communicating with various

members of the news media." Close examination of the affidavit, however, reveals that it does not so state. It does not state that the regulation (Paragraph 415.071) remains in force, although we will stipulate that it did. The affidavit fails to state that this regulation has prevented plaintiff Hillery from communicating with various members of the news media. It states that Hillery had been prevented from being interviewed by a member of the staff of Earth Magazine, which is no longer publishing. In point of fact, any such prevention of an interview could not have taken place pursuant to Paragraph 415.071, as this provision is not interpreted as governing visits between an inmate author (the status claimed by plaintiff Hillery in his original complaint) and his publisher or prospective publisher, as such visits are not considered news media interviews. This fact is brought out in an affidavit of R. K. Procunier, to be filed in this matter within a few days.

The experience of plaintiff Hillery is used in the affidavit to illustrate possible "irreparable damage" in the form a failure of a magazine or newspaper which might have printed what some prisoner had to say. But there is no showing that any prisoner, including Hillery, presently desires to communicate any information to or through any publication which might be in danger of failure. The remainder of the affidavit, concerning the alleged repeated attempts of the affiant's clients to communicate with unspecified "authorized" members of the news media "in order to exercise their first amendment rights" is

too vague and insubstantial to be considered as evidence to support the issuance of a temporary restraining order. Moreover, there is no indication of what these people wish to communicate and why such communication could not be deferred until a final ruling on this matter by this Court. Furthermore, there is no allegation that any prisoner has been denied his right to correspond in writing with any member of the news media or any showing that plaintiffs or other inmates are unable "to effectively communicate information concerning their confinement in San Quentin State Prison" by such correspondence.

In sum, there has been no substantial showing of irreparable injury on the part of inmates by continued enforcement of the regulation in question. By contrast, the restraining order itself offers considerable potential for the sustaining of irreparable injury by defendants. Defendants, who are prison administrators of great experience, are charged with the legal responsibility of managing the prisons of California. They have done so according to their best judgment, formulated in light of their extensive experience. By requiring defendants to admit into the prisons and allow to perform certain acts there persons who, in defendants' judgment, should not be there or perform such acts, the restraining order trenches severely upon defendants' ability to discharge their legal obligations. If any of a number of possible consequences should ensue, ranging from minor disciplinary problems to prison riot and even murder, "irreparable injury" caused by the restraining order will surely

have been demonstrated. We submit that the possibility of such serious consequences of the order greatly outweighs any conceivable showing of "irreparable injury" to plaintiffs.

Conclusion

For the foregoing reasons, it is respectfully submitted that the temporary restraining order issued November 1, 1972, should be dissolved, pending further order of this Court.

Dated, November 20, 1972.

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant
Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General
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Attorneys for Defendants

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[Proposed Order and Declaration of Service Omitted in Printing]

In the United States District Court
For the Northern District of California

[Filed Nov. 22, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF R. K. PROCUNIER

R. K. Procunier, being first duly sworn, deposes and says:

I am Director of Corrections of the State of California, a position which I have occupied since 1967. I have been employed continuously since April 1948 in the corrections field. For approximately one year, during 1957-58, I was first Deputy Director, Personnel Management and Training, and then Director of Corrections, of the State of Utah. The remainder of my employment since 1948 has been with the Department of Corrections of the State of California. The positions I have held, both institutional and departmental, include correctional officer, sergeant, and lieutenant; Assistan Departmental Personnel Officer; Departmental Training Officer; Associate Superintendent of California Medical Facility; Superintendent for Inmate Classification for the Department; and Associate Superintendent and Superintendent of Deuel Vocational Institution. I held the last-named position immediately prior to my appointment as Director. The opinions and conclusions expressed in this affidavit are drawn from the knowledge and experience which I have acquired by virtue of holding the foregoing positions.

This affidavit is submitted in explanation and justification of those portions of Administrative Bulletin

No. 72/40 with which I understand plaintiffs have expressed dissatisfaction.

I

The definition of "news media representative" was formulated in lieu of any definition by the Court, in order to limit interview privileges to a reasonable number of legitimate, as opposed to self-proclaimed, representatives of the media. The definition corresponds generally to the definitions of news media representatives used by various private organizations and other governmental agencies for the purposes of granting or withholding press privileges. According to my information and belief, the correspondents' association in the State Capitol limits official recognition and privileges to "bona fide correspondents of reputable standing in their business who represent daily newspapers requiring a daily file of legislative news or who represent news associations requiring daily telegraphic reports or radio or television services on legislative news." The California Highway Patrol issues press identification cards to news reporters who are identified in formal written requests from media executives. Identification cards are not issued to free-lance writers and others not normally engaged in news reporting. The Los Angeles Police Department issues official identification cards to "actual news gathering representatives of daily newspapers or publications printed in Los Angeles, news services, or radio or television stations maintaining a regular news service." Such identification cards and attendant privileges are not given to free-lance writ-

ers and employees of weekly newspapers which do not regularly cover police news. This position was recently upheld in the case of *Los Angeles Free Press, Inc. v. City of Los Angeles,* 9 Cal.App.3d 448 (1970).

Visits between inmate authors and their prospective publishers are not prohibited by Administrative Bulletin No. 72/40 or by its antecedent, Administrative Manual Paragraph 415.071. Such visits are not considered news media interviews. The allowance or disallowance of such visits is a matter for institutional regulation. Wardens and superintendents are authorized to permit special-purpose visits on a case-by-case basis, and such visits include visits by an inmate's publisher. In at least one instance, an inmate has been allowed visits with a "ghost writer" to assist him with preparation of material for publication.

Similarly, free-lance writers, staff writers for general magazines (as opposed to news magazines), and persons writing books are not covered by A.B. 72/40, but are allowed to visit inmates at the discretion of the warden or superintendent (subject to departmental review). The exercise of this discretion is based on such factors as the nature of the project under way, the necessity for the interview, and the time available for institutional cooperation.

The definition of "news media representative" is in my view a very liberal one, offering inmate access to hundreds and even thousands of bona fide news gatherers. I have no reason to believe that the definition does not fully protect the inmates' First Amendment rights of self expression. Until and unless it is shown that "news media representatives," as defined in A.B.

72/40, will decline to provide a forum for individual inmates that would be provided by other persons claiming to be news gatherers, I must assume that inmates' rights will be protected by the existing definition.

II

The provision permitting prohibition of interviews at such times in which, in the judgment of the warden or superintendent, interviews would jeopardize the current safety and good order of the institution or be detrimental to the welfare and best interests of the inmate involved is viewed as a measure to be applied rarely, if at all. It permits at most a temporary suspension of interviews during such times as the institution is in a state of unrest, an escape attempt has recently taken place, or for other reasons an interview is not feasible. The impossibility of foreseeing all circumstances requiring the suspension of interviews, including circumstances personal to an individual inmate, such as a recent personal tragedy, requires a regulation vesting latitude in the individual warden or superintendent to make a judgment based on whatever situation may arise. This provision is not intended to permit the circumvention of this Court's order or to authorize an arbitrary application of the provision. Based upon my knowledge of and experience with the various wardens and superintendents, I am confident that it will not be so applied.

III

Inmates psychiatrically diagnosed as psychotic are not permitted interviews because they are not in contact with reality and are in a state of severe emotional

stress. In all such cases it would be detrimental to the best interests of the inmate to expose him to news media inquiries. Similar provisions frequently apply to hospitalized psychiatric patients in the Department of Mental Hygiene or in community mental health programs. The Department of Mental Hygiene generally prohibits interviews with mentally ill patients, although there is a possibility of exceptions, depending on the circumstances of the individual case, and with the specific approval of the attending physician.

IV

Interviews of inmates in isolation or segregation are not permitted. Isolation status is punitive in character. One of its punitive objects is to keep the inmate's contact with others at an irreducible minimum. Isolation status is only temporary; an inmate may be placed in isolation for a maximum of ten days, except with my express approval of a longer period.

The considerations behind the prohibition of interviews with inmates in segregation status are different. Inmates in segregation are often the most recalcitrant, obstreperous and dangerous in the entire prison population. They are separated from the general inmate population because they have been judged, after careful classification procedures, to pose a danger to staff and inmates and the good order of institutions, or because they must be protected from harm at the hands of other inmates or even themselves. Their segregation status is temporary and regularly reviewed. Thus, such men are great security risks and there are extremely difficult problems associated with those in-

stances in which they must be moved to a designated location for press interviews.

Further, there is a very real need to prevent such inmates from gaining notoriety via news media because of their behavior. Such recognition reinforces the type of behavior which caused them to be segregated in the first place. If dangerous and recalcitrant inmates in segregation become heroes or public figures with their peers or the general public by unusual attention from the news media, it is detrimental to the general operation of the institution and to the welfare of the individual himself.

It is my opinion, based on the totality of my correctional experience, that allowance of media interviews with inmates on segregation status would pose unacceptable risks to the safety and discipline of the institutions involved.

Still different considerations support the temporary ban on interviews with inmates newly received from court or recently returned from parole. All newly received or returned inmates face a difficult period of orientation or reorientation to prison. Most of them will spend a temporary period in a reception center and then move on to a permanent assignment at a different institution. Nearly all such men have gone through a very upsetting experience during a trial or in the process of parole revocation. They need time to settle down. In a great many instances, added public attention to their cases would complicate the difficult period of orientation to institutional life. It is my opinion that some reasonable period, varying

from two to six months, depending on the circumstances of the individual case, would be beneficial to all newly received and returned inmates.

V

The regulations respecting interviews with inmates awaiting trial are essentially the same as existed prior to August 21, 1971, and which were approved in *Yarish v. Nelson,* 27 Cal.App.3d 893, 900 (1972): "The imposition of the consent requirement by the inmate, his counsel, his codefendant or by the court as the case may be, is reasonably related to a legitimate end embraced in the police power of the state and is supportive of the prisoners' right to a fair trial." As a state agency, the Department of Corrections has an obligation to protect the legal rights of those persons in its custody who are charged with crime. The regulations in question are designed to effect such protection, and were certainly not, as plaintiffs have suggested, designed to permit circumvention of this Court's order. It is obvious that an inmate awaiting trial who is allowed a media interview could be quoted or misquoted in the news media as making a statement which would be prejudicial to the rights of the inmate himself or codefendant. The regulations in question do not permit a member of the Department to prohibit an interview with an inmate awaiting trial, but confer such prohibitory power only upon the inmate's attorney (who is charged with protecting his client's rights) or a judicial officer, who must be presumed to act in a lawful manner and with due regard for the interests of

maintaining the right to a fair trial. The rights of an inmate's codefendants must certainly be protected, and the regulations protect these rights, not by requiring the consent of codefendants or their counsel to any interview, but merely by imposing a requirement of notice, which would permit codefendants or their counsel to exercise any options which may be open to them to protect their own legal rights.

VI

The limitation of interviews with a specific inmate to once in any six-month period aims principally at permitting the inmate to concentrate on serious and constructive programs and requirements of the institution without becoming embroiled in and diverted by personal publicity to build his status with fellow inmates or the public. Because of media attention there have been extreme cases in which inmates had time for little else but media interviews. For example, one inmate was interviewed 66 times in a six-month period. This limitation is an attempt to provide reasonable guarantees of the inmate's right to access to the news media while preventing gross abuse such as that cited above. With this limitation, additionally, it is much less likely that certain very notorious inmates will enhance their status from a prison cell forum. Such inmates will be in a better position to devote themselves to useful activities such as school, counseling, psychiatric treatment, and other programs if they are limited to news media interviews only once in any six-month period. It is noted that exceptions to this

limitation can be approved by me if circumstances warrant.

Further, this limitation permits orderly scheduling of interviews and allows departmental personnel to discharge their regular functions without undue diversion by the necessities of scheduling, arranging for, and supervising interviews. If each inmate in the Department had one interview every six months, there would be some 45,000 annual interviews, which would constitute a crushing administrative burden. Such a possibility is, of course, unrealistic. But if only 10% of the inmates had semiannual interviews, some 4,500 would take place. If a larger number of interviews per inmate in a six-month period were permitted, the above figure, representing potential interviews, would be multiplied accordingly and pose extremely difficult administrative problems.

VII

The provision that news media may be required to pay for the cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview contemplates only rare instances. A simple interview with an inmate on mainline status would ordinarily not entail extra costs for supervision or security which would have to be passed onto the news media. In any event, only actual costs for extraordinary services would be assessed against the media. I do feel, however, that the State has no obligation to "foot the bill" for such extraordinary services, and that in those rare instances in

which such services may be necessary, it is proper to require that the costs be borne by the media.

VIII

I should also like to point out that any decision made by institutional personnel concerning the application of any of the provisions of A.B. 72/40 may be appealed by the inmate (via sealed letter) or the media person involved to the institution head, to the Deputy Director of Corrections, to me, and to the Secretary of Health and Welfare, any of whom has authority to overrule the decision. This appeal procedure provides a mechanism for the exhaustion of administrative remedies and should ensure that no question of the proper application (as opposed to the content) of the regulations need be brought before this Court for resolution.

I declare, under penalty of perjury, that the foregoing facts are true and correct according to the best of my knowledge and belief, and that if called as a witness, I could testify competently thereto.

Dated: November 21, 1972.

/s/ R. K. Procunier

[Jurat and Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed 1/30/73]

[Caption Omitted in Printing]

MEMORANDUM AND EXHIBITS IN RESPONSE TO THE AFFIDAVIT OF DEFENDANT RAYMOND K. PROCUNIER CLARIFYING ADMINISTRATIVE BULLETIN No. 72/40

Plaintiffs submit this memorandum and attachments in response to the affidavit of defendant Raymond K. Procunier, which has attempted to clarify and explain Department of Corrections Administrative Bulletin No. 72/40.

I.

The definition of "news media representative" as delineated in Department of Corrections Administrative Bulletin No. 72/40 (hereafter called "the interim rules") is so limited that it subverts the orders of this Court issued on September 28 and October 31, 1972, which establish the first amendment rights of prisoner plaintiffs in this action to interview with representatives of the media. The only reason that Mr. Procunier states in his recent affidavit for imposing any limitation on which media can visit is "to limit interview privileges to a reasonable number of legitimate, as opposed to self proclaimed, representatives of the media" (Procunier affidavit, p. 2). While plaintiffs do not question Mr. Procunier concern with limiting media interviews with true representatives of the media, the standards that Mr. Procunier has

created are so arbitrary so as to exclude many representatives of "legitimate" media including *all* of the media plaintiffs in this present lawsuit. The result is that plaintiff prisoners are totally prohibited from interviewing legitimate, qualified media representatives who are often the only media persons who are concerned enough to take time to interview a prisoner. For Mr. Procunier to say that prisoner plaintiffs have adequate access to the media is meaningless when those publications have their own limitations and often do not want to interview prisoners. This stand is even more tainted when there are media people like the media plaintiffs in this lawsuit who are often the most concerned and responsive to the communication needs of prisoners who are already available to interview prisoners. The attached affidavits of several plaintiffs as well as letters from two professors at the Department of Communications at Stanford University should be examined to demonstrate the arbitrariness that the interim rules have imposed in disservice to the first amendment. (See attached affidavits of plaintiffs Paul Jacobs, Eve Pell, Bobby Bly and Betty Segal, and letters of Professors David L. Grey, and William L. Rivers.)

Mr. Procunier's affidavit completely shifts the burden that should be met by the defendants to support their arbitrary interim rules that act as a prior restraint on the first amendment rights of the plaintiffs. He claims that since the prisoner plaintiffs have been given certain media outlets by the interim rules, they are entitled to none other. The defendants have raised

this same argument at an earlier stage of this proceeding when they claimed that prisoner plaintiffs were entitled to *no* media interviews since they could always right letters to the media. The court already rejected this contention that one channel of expression was adequate to protect the plaintiffs' first amendment rights when it determined that the defendants' ban of media visits was invalid. The Court should apply the same logic and declare invalid the rules that exclude certain media representatives to act as proper communications channels for the prisoners.

The fact that Mr. Procunier claims that interviews with other media representatives, not specified in the interim rules, can be allowed at the discretion of the warden does not solve the problem that a certain portion of the media are categorically deprived from helping prisoners to exercise their first amendment rights and are allowed to do so only in a state of grace. The very fact that this discretionary power is permitted emphasizes that the exclusion of certain media has been unscientifically based on arbitrary grounds which bear no real relation to security needs and space requirements. Plaintiffs also express grave doubts to the good faith of this representation of Mr. Procunier since none of the visits that have been requested in this lawsuit have been allowed on this discretionary basis.

Defendant Procunier's major problem in attempting to create standards to define a "media representative" is that he is operating from a position of ignorance in that area. Despite his many other qualifica-

tions listed in his affidavit, Mr. Procunier isn't the proper person to defeine what media is, what media does, and what a media representative may be. Mr. Procunier directs a prison system and is not qualified to determine who a media person is. He has chosen to select certain limited standards to impose on media interviews in prisons, which appear completely out of place when analysed by persons qualified to determine who media representatives actually are. The letters and affidavits referred to earlier which have been prepared by persons who are in media and persons qualified to teach about media hopefully will clarify for the Court how media persons see themselves, how they define their work and their needs, and how they provide channels of communication for prisoners; these reports also reveal the principal defects of the Procunier affidavit and interim rules. (See Jacobs, Segal and Pell affidavits and Grey and Rivers letters.)

It is clear from the exhibits attached hereto that media refers to all the various channels through which communications occurs and information is disseminated. Although this lawsuit focuses on the realm of public *media,* where the information is ultimately disseminated to the public at large, this is not limited to the so-called "news media." There are other forms of journalistic media, that is not news, through which the ideas of prisoners should merit expression. While reporters with press passes may be found in the realm of news media, the free-lance writer with special expertise about a particular subject, such as prisons, is

the source of most of the copy in what can be termed non-news type publications. Mr. Procunier's assertion that those media representatives who are not covered by the interim rules may be permitted interviews "in the wardens' discretion . . . based upon such factors as the nature of the project . . ." clearly amounts to prior censorship and offers a compelling reason why a broader more realistic definition of media should be applied in this case. (See Procunier affidavit, p. 3.) Plaintiffs have suggested the definitions of media and media representatives that are found in the attached "Plaintiffs Proposed Media Interview Regulations" to reflect the reality of media today without sacrificing the first amendment.

II.

Despite the qualification that Mr. Procunier makes in his affidavit that the provision allowing for the suspension of media interviews would only be used during crises situations, the section as written is unconstitutionally vague and overbroad. To apply the language of *Cox v. Louisiana (I)*, 379 U.S. 536, 557-558:

> It is clearly unconstitutional to enable a public official to determine which expression of view might be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing broad discretionary licensing power or as in this case, . . . the practice of allowing unfettered discretion in local officials . . . is an unwarranted abridgement of . . . (the) freedom of speech and assembly.

Mr. Procunier has been able to articulate in his affidavit many more specifics than are included in the interim rules themselves and a similar specific listing could be included in the actual rules promulgated by the department to assure a definite limited standard. When the freedoms guaranteed by the first amendment are being impinged, this specificity is vital. See *Grayned v. City of Rockford,* ..... U.S. ....., 92 S. Ct. 2294 (June 26, 1972); *Coates v. Cincinati,* 402 U.S. 611, 91 S. Ct. 1686 (1971); *Cox v. Louisiana (I), supra; Amsterdam,* 109 U. Pa. L. Rev. 67 (1960), The Void For Vagueness Doctrine in the Supreme Court.

Plaintiffs have suggested in their proposed regulations that visits be allowed at all times that other visits to the prisoners are allowed. Only when a true emergency exists and the prison officials do not have enough control of the prison to allow prisoners to come to the visiting room should they have the discretion to suspend visiting rights between prisoners and media. Only in a situation where a "clear and present danger" exists which media visits would aggravate should the rights protected by the first amendment be suspended. (See Sec 10.00 Proposed Regulations)

III

Mr. Procunier's explanation why "psychotic" prisoners are not permitted interviews with the media is another unqualified opinion which he as a prison administrator is not competent to make. Dr. Fank Rundle, former chief psychiatrist of Soledad Prison and current Acting Director of Prison Mental Helath

Service of the Health Services Administration of New York, responding to the interim rules and the Procunier affidavit totally repudiates the archaic attitude that psychotics should be barred from having visits with the press. Dr. Rundle notes that the term "psychotic" is an imprecise generalization which could be overly applied. "Institutional needs are placed above the needs of individuals" and "pressures from custodial personnel" often determined which prisoners are determined to be "psychotic". Including Dr. Rundle rebuts the justification offered by Mr. Procunier that "psychotics are kept from the media for their own good by showing that outside contact of all types including interviews from the media can only be beneficial to prisoners whether they are labelled "psychotic" or not.

IV.

The reasons stated by Mr. Procunier for not allowing prisoners in segregation or isolation to interview with the media are legally impermissible. Mr. Procunier claims that the major consideration for not allowing prisoners in isolation to receive media visits is because they are being punished. This explanation appears to be incredible in light of the subject matter of this case and orders that have already issued. Although it is clear that all prisoners are being punished by their confinement in prison, it is equally certain that they retain certain first amendment rights and one of those rights as already defined by this Court is the right of free speech and the right to interview

with members of the media to implement that right. Simply stated prison officials cannot punish a prisoner by cutting off his first amendment rights. As plaintiffs have already demonstrated, apparently to the satisfaction of this Court, in their "Memorandum In Support of Motion for Preliminary Injunction," March 7, 1972, pp. 7-12, and in virtually all other pleadings filed in this case, the law is clear that deprivation of first amendment rights cannot be a *method* of punishment. While first amendment rights may be suspended when the speech itself comes into conflict with some compelling state interest by presenting a clear and present danger, what Mr. Procunier is claiming in his affidavit is that totally innocent speech may be barred for general punitive purposes. The outrage is further compounded when one is aware that despite the fact that the purpose of isolation status "is to keep the inmate's contact with others to an irreducible minimum," (See Prounier affidavit, p. 5) visits from family and friends are allowed at San Quentin even for prisoners in isolation. (See attached San Quentin Visiting Privileges, November 1, 1972, #15). Similarly, the prison officials have not considered suspending the right of prisoners in isolation from having attorney visits. The Court should note that prisoners in isolation are being subjected to the most onerous conditions in the prisons and are likely to have much to express to the media. To punish a prisoner by suspending his first amendment rights should be viewed in the same light that beating a prisoner for punishment is seen—each is proscribed by the first and eighth amendments respectively.

Mr. Procunier has attempted to justify the arbitrary ban on media interviews with prisoners in segregation by his characterization of those prisoners as the most dangerous and raising the spectre of violence to support his assertion. Mr. Procunier has confused the Court by not fairly explaining who is in segregation. Not only are prisoners there for a wide variety of disciplinary offenses, predominantly of a nonviolent nature, but there are also prisoners who have never been charged with a disciplinary infraction who are segregated in either —COPY RAN OFF PAGE. Many of those prisoners in "administrative segregation", as plaintiff Bobby Bly was, are so confined without any disciplinary charges ever being filed and for constitutionally impermissible reasons such as political ideology. (See attached affidavit of Bobby Bly) Refusing to allow the media to interview prisoners like Bobby Bly, whose illegal confinement in segregation is now being litigated, helps to further perpetuate questionalble practices of the Department of Corrections by preventing the public from ever hearing the first hand complaints of the prisoners who are so confined, with no due process for impermissible reasons.

Even in the case of those prisoners who are in segregation for alleged disciplinary reasons, Mr. Procunier has gone no further than he did when defending the primary issue in this lawsuit for which plaintiffs have already been successful in obtaining a temporary restraining order. Defendants earlier in these proceedings made the argument that prisoners categorically would pose a security risk if they had media

interviews, since "big wheels" or heroes would be created in the prison population and pose a threat to the institution. In the Memorandum Opinion of September 28, 1972, this Court took notice of that justification offered by the defendants and still found that defendants' regulations and conduct posed a prior restraint on the first amendment rights of the prisoner plaintiffs. Just as the speculative fears of prison officials were not sufficient to bar media visits to prisoners generally, their speculation is not enough to bar such visits with prisoners in segregation. This type of analysis was specifically reaffirmed by Judge Gessell in the case of *Washington Post Co. v. Kleindienst,* Civil Action No. 467-72, U.S. D.C., D.C., Supplemental Memorandum, December 19, 1972, after the issue of the "big wheel" theory was remanded by the Court of Appeals for further fact finding. (See opinion attached).

Although prisoners in segregation may in some instances pose a greater security problem than other prisoners, to totally eliminate their right to visit media seems to be a method for which there are clearly less restrictive alternatives that could be utilized to meet security needs and still not retard these prisoners freedom of speech. Prisoners in segregation have visits with family and friends and they visit with their lawyers. In both of those situations prison administrators have been able to establish a greater degree of security necessary for prisoners in segregation without the necessity of barring those visit entirely. It appears inconsistant for Mr. Procunier to

say that barring media visits to prisoners in segregation is the only way to achieve necessary security.

Prisoners in segregation are often there for a myriad of impermissible reasons that have already been mentioned. The conditions of segregation are many times the most brutal and arbitrary and deserving of exposure to the public. First hand stories from prisoners who are actually being subjected to such treatment to responsible media representatives may help to create a climate where those inequities are eventually eliminated.

V.

The interim rules provision suspending the right for media interviews for prisoners who have been recently returned from court and those returned from parole appear to be arbitrary violations of the first amendment, as a prior restraint on free speech, and the fourteenth amendment's equal protection clause. For Mr. Procunier to limit these particular prisoners' freedom of speech and also create a separate burdensome classification for them he must first establish a compelling state interest for taking that action. Mr. Procunier fails to meet that burden in his affidavit, since all that he has done to defend the rule is to allege that immediately after entry to prison the transition is difficult and in his opinion it is best to keep prisoners away from the media. He claims that "added public attention to their cases would complicate the difficult period of orientation to institutional life." (Procunier affidavit p. 6.) He offers no specific

evidence to support his contention and clearly makes no attempt to show how the need for this special classification overbalances the prisoners' freedom of speech and the right to be free from discriminatory classifications. The added factors that a person recently returned from court may have particular current information about his case and that anyone who has recently come to prison may have a prior working relation with a media person make plaintiffs' objections even more compelling.

VI.

The provisions of the interim rules that prohibit interviews with prisoners awaiting trial creates blatant problems arising from the equal protection clause of the fourteenth amendment. Why should a prisoner awaiting trial while he is confined in state prison have his first amendment rights limited to any greater degree than a person awaiting trial who is not in prison? None of the reasons stated by Mr. Procunier in defending the interim rules address themselves to that crucial problem. A prisoner who is charged with a felony or other crime and who is either confined in a county jail as a pre-trial detainee or who is not in custody can speak to the media without all the prerequisites listed in the interim rules. Mr. Procunier claims that "As a state agency, the Department of Corrections has an obligation to protect the legal rights of those persons in its custody who are charged with a crime." (Procunier affidavit, p. 7.) This overlooks the fact that county jails are also a state agency and they have found no great difficulty in protecting

the legal rights of persons charged with crimes without suspending certain other of those legal rights such as those protected by the first amendment. This analysis also neglects the doctrine of the separation of powers and usurps the judiciary's right to impose a gag rule if that is necessary for a particular case. Mr. Procunier also conveniently avoids the fact that even if there is a court imposed gag rule concerning a particular criminal proceeding, that gag rule applies only to the matters involved in the criminal case and not a blanket prohibition against all contact with the media.

Mr. Procunier is concerned with the rights of co-defendants, which is thoughtful, but illegally intrusive in this situation. To pose the co-defendant problem in its most dramatic form, what would happen if one defendant was confined in a California state prison and the co-defendant was free on bail? Clearly the restrictive regulations concerning media contact would apply to the person in state custody but would not apply to the person free on bail—a denial of equal protection.

The requirement that the prisoner's lawyer must give consent before a media interview violates the equal protection clause as well as overlooking the basic relationship between the lawyer and his client. Basically the lawyer is the retained employee of the client and for the lawyer to be required to give his consent on aspects of how the client is to conduct his life is as absurd in prison as outside prison. Outside prison, the usual practice is for the lawyer of a per-

son charged with a crime to advise that person what types of things he should or should relate to the media and whether it is advisable to communicate to the media at all. Once the client has been so apprised, he is free to make his own choices at his own jeopardy. There is no reason why these same methods are not sufficient in a prison setting, rather than the bureaucratic, time-consuming scheme included with the interim regulations. The requirement of lawyer consent is particularly frightening in the situation where there is counsel appointed and the prisoner defendant is attempting to have appointed counsel replaced by counsel of his choice. This is actually true in the case of plaintiff John Larry Spain, whose application for counsel of his choice in the Marin County Superior Court is awaiting the determination of the California Supreme Court in the case of one of his co-defendants, *In re Drumgo.*

VII.

Prior to the controversy in this case that arose out of the events of August 21, 1971, prisoners in the custody of the California prison system were allowed an unlimited number of interviews with media representatives who agreed to come to interview—all without any general problems arising. It is curious that instead of relying on the Department of Corrections own past experience and specific past records of those earlier interviews that occurred before August 21, 1971, Mr. Procunier has chosen to rely primarily on a hypothetical projection of how many interviews could potentially occur to justify limiting media visits

to one every six months for each prisoner. Perhaps the reason that Mr. Procunier has had to rely on a future projection is because past records simply do not support his prediction that the visiting room will be swarming with people comming to interview prisoners. The Answer of Warden Louis Nelson of San Quentin Prison to Interrogatories, dated April 7, 1972 seem to support this conclusion. When in Interrogatory No. 4 Mr. Nelson was asked: "Over the past year (February 20, 1971—February 20, 1972) how many prisoners have requested interviews with outside media?" Mr. Nelson answered, "We have no records of this information. *Requests by prisoners for interviews with media are rare,* and none are recalled." (emphasis added) If such interviews are so *rare,* then Mr. Procunier's speculation appears to be completely out of proportion with reality. This is probably true since unfortunately members of the media have other committments and have been all too reluctant to come to prisons to interview prisoners except on a very limited basis. So dispite the fact that in one very dramatic instance a prisoner had 66 visits within a six month period (still less than three per week), Warden Nelson stated that media interviews were "rare" and said "none were recalled", since most prisoners apparently have none.

Besides projecting numbers into the future, Mr. Procunier has attempted to rationalize the six month rule by raising the strong, disruptive, "big wheel" spectre in a slightly different form. At this point, Mr. Procunier argues that too many visits will create the "big wheel" and cause an imbalance in prison equilib-

rium. But again plaintiffs can discern nothing more than the same unsubstantiated, opinionated speculation which has already found to have defective logic by this Court and the court in the *Washington Post* case whose most recent pronouncement on this precise issue is attached.

Mr. Procunier's contention that allowing too many media interviews will have a deleterious effect on a prisoner's rehabilitation by interfering with his prison program is further guesswork on his behalf and is supported by no factual evidence. Besides being completely speculative, this notion of minimizing media contact for rehabitlitative purposes is undercut by two factors. First, no other types of visits are limited in this manner to achieve better rehabilitation. The Department of Corrections' own research division has recently found that quite the opposite is true, and better visiting arrangements while in prison create a better chance for the prisoner to succeed when he is released on parole—there is a direct positive correlation. (See sections of "Explorations in Inmate-Family Relationships, California Department of Corrections Research Report No. 46, Norman Holt and Donald Miller, January, 1972 (Hereafter called the *Holt Report.*) This may be true because, as Dr. Rundle states in his letter, "An interview with an interested person whether news media representative or not would have a beneficial effect upon any inmate, whether 'psychotic' or not, since it would at least for a brief time offset the psychological devastating effect of isolation from the community which is imposed by prison." (See Rundle letter, attached) Second, the

unfortunate fact is that many prisoners are not able to participate in meaningful rehabilitative programs for various reasons. Consequently, a prisoner is not missing anything significant by taking time for a media interview; only the "devastating effect of isolation" which Dr. Rundle speaks of.

Prisoners should be allowed unlimited visits from the media for interviews each day the prisons are open to visitors. If this is shown in fact to be burdensome, the prison officials would then be in a position to document any limitations that may be necessary. In doing so, the Department of Corrections should carefully note the concluding paragraph of the Holt Report which states: "All restrictions on visitors and mail should be closely scrutinized with the objective of eliminating all regulations which are not necessary to promoting the absolute basic security of the institution. *No restriction should be allowed to remain whose only reason is the limit in space. Space must be found.*" (See attached *Holt Report,* p. 64.) Prior to a showing that frequent visits by media representatives cause a real burden to prison administration, the Department of Corrections should not be permitted to impose such stringent limitations as the six month delay between interview section, since it so seriously interferes with the rights of prisoners to have meaningful interviews (See Jacobs affidavit, p. 3.)

VIII.

Plaintiffs would not question the portion of the interim rules that call for assessment of costs for

interviews if the rules themselves were explicit and clearly indicated that there would be no additional costs for ordinary interviews that could occur in the regular visiting areas, as Mr. Procunier's affidavit does. However the attached letter from Lee DeBord, San Quentin Information Officer, to Mark Schwartz of radio station KPFA, provides clear evidence of the abuses of this regulation that have already been realized. Plaintiffs do not question the need to charge for services that go beyond simply making it possible for a simple interview to take place by having the prisoner and media person come together in the regular visiting area, and they specifically provide for special cost in section 7.00 of the Proposed Regulations. This type of assessment should be only for special types of interviewing with specific extra costs to the prison.

IX.

Although the appeal procedure outlined in Mr. Procunier's affidavit is useful, it should be limited to the most difficult situations that require particular scrutiny—those where specific abuses are raised to bar a media representative from having an interview with a prisoner. In this paramount area of the first amendment, the burden is on the state to show why infringement on free speech is vital, and this burden should not be reversed by an elaborate appeals system that must be utilized before the most ordinary interview is realized. Hopefully explicit rules such as those proposed by the plaintiffs will eliminate the need for appeals in all but the most questionable interview situations.

X.

Although plaintiffs neglected earlier to question the requirement that notice for an interview be given to the warden one week in advance in writing, it strikes plaintiffs as an unnecessary burdensome procedure in light of other visiting practices of the Department of Corrections. Visiting with family and friends requires no prior notice. Visits from attorneys generally require no prior notice to the prison. Certain prisons such as Deuel Vocational Institution and Folsom Prison which request prior notice for legal visits appear to do so for the purpose of arranging for private interview area outside the regular visiting areas; however, even those prisons which require notice for attorney visits are usually satisfied by a telephone call on the way to the prison and failure to comply with prior notice requirements results only in delay not complete prohibition of the visit. It is hard to conceive of any reason why such a long time is needed to prepare for simple media interviews that could be held in regular visiting areas and for no other type of visit. Any examination of identification credentials can occur at the gates of the prisons as it does with other visits.

Conclusion

The Temporary Restraining Order issued by this Court on October 31, 1972 should be modified to prevent defendants from imposing the restriction of the interim rules, Administrative Bulletin, 72/40, on media interviews and the Court should incorporate

the Plaintiffs' Proposed Media Interview Regulations in its order as standards for defendant conduct.

Respectfully submitted,

/s/ Richard M. Doctoroff
Richard M. Doctoroff
Patti Roberts
Counsel for Plaintiffs

Jan. 29, 1973

[Exhibit A]

Plaintiffs' Proposed Media Interview Regulations

1.00 All consenting prisoners shall be permitted to have confidential interviews with representatives of the media.

2.00 Media shall be defined as follows:

2.10 All newspapers, magazines and other regular publications, including but not limited to those which qualify for second class United States mailing privileges;

2.20 All radio and television stations that are licensed for public broadcast by the Federal Communications Commission and all networks composed of those stations;

2.30 All publishers of books;

2.40 All news services;

2.50 All film and videotape production companies.

3.00 Media representatives shall be defined as follows:

3.10 All persons who are employed by the media defined in 2.00 above in a reporting, writing, editing, publishing, directing or photographing capacity;

3.20 All free lance writers, reporters, editors, publishers, directors or photographers who are affiliated with any of the media as listed in 2.00 above for a particular project;

3.30 All free lance writers, reporters, editors, publishers, directors, or photographers who earn "a substantial portion of their income" from free lance media activities.

4.00 Consent by prisoners for media interviews shall be given in the following three forms:

4.10 A letter from the prisoner to the media or media representative asking for an interview; or

4.20 A letter or other writen authorization from the prisoner's attorney authorizing the interview with the prisoner; or

4.30 A consent form signed prior to the commencement of the interview.

5.00 Identification credentials may be required to be presented by media representatives at the time of entry into the prison for the interview.

6.00 Interviews occurring in the area of the regular visiting facilities will be limited in time only by existing space requirements; in no case shall the length of the interview be limited to less than one hour.

7.00 There will be no cost assessments for regular interviews that take place in the area of the regular visiting facilities; special type interviews outside the

facilities used by other visitors may result in charges for extra costs to the prison.

8.00 Special type interviews, such as those that involve filming, which take place outside the area of regular visiting facilities in other portions of the prison shall be requested at least one week in advance.

9.00 Tape recorders will be provided to media representatives who provide their own tape cassettes; special prior arrangement at least one week in advance shall be required for other equipment necessary to be brought into the prison.

10.0 Interviews with representatives of the media shall be suspended only in the event of extreme emergency when officials no longer have sufficient control of the prison and a clear and present danger makes it impossible for the officials to safely transport prisoners to and from the interviewing facilities.

[Exhibit B]

AFFIDAVIT OF PAUL JACOBS

State of Hawaii
County of Honolulu—ss.

I hereby swear and depose as follows:

I am a writer, an Associate Fellow of the Institute of Policy Studies in Washington, D.C., and a Research Associate of the Center for the Study of Law and Society, University of California, Berkeley. I am also a member of the Society of Magazine Writers, the professional organization of magazine writers, and of the Authors' League, the professional group of published writers.

In addition, I am a television commentator. I also write and produce television programs and motion pictures and lecture at college and university campuses all over the country.

I have written seven books, all published by major publishers, and hundreds of articles for such general magazines as Atlantic, Commonweal, Commentary, Harpers, New York Review of Books, New York Times Magazine, Playboy, Ramparts, and the Reporter. I have also published articles in professional and technical journals such as the California Law Review, The Economist of London, and the American Sociological Review, to cite just a few.

I was a member of the Journalism Faculty of the University of California at Berkeley and have taught at California State University at San Francisco. I have been the Regents' Professor at the University of California at Santa Barbara and have appeared as a guest lecturer at Police Training Institutes conducted for highranking police officials by U.C.L.A. and U.S.C. I have also addressed conventions of parole and corrections officers and the American Psychological Association, the American Sociological Association, the American Orthopsychiatric Association, and the National Conference on Social Welfare.

My entire professional work focuses on the social issues confronting society, including of course the criminal justice system. I have studied R. K. Procunier's affidavit concerning the regulations established by the Department of Corrections under A.B. No. 72/40, and I believe Mr. Procunier's justification

for these regulations to be completely unsatisfactory. The definition he cites of "news media representatives" established by the Correspondents' Association, the California Highway Patrol, and the Los Angeles Police Department is totally irrelevant to the issue involved for writers like me. The rules for membership deal, primarily, with the use of facilities such as the press rooms, teletypes, office space, etc., and are not designed to prevent journalists from access to legislative sessions or from interviewing legislators. The issuance of police press cards is equally irrelevant as a justification for the Department of Corrections policy since those cards do no more than give the reporters the right to cross police lines. Whether a journalist has a press card or not does not affect a journalist's right to interview police officials, for example. Indeed, I have interviewed many police officials and never once have I been asked for a press card.

Mr. Procunier maintains that a writer like me would not be covered by A.B. No. 72/40 and that my right to interview a prisoner and the prisoner's right to be interviewed will be determined by the warden or superintendent. But if "news media representatives", as defined by Mr. Procunier, cannot be restricted in their visits by the warden, it is totally discriminatory for the warden or superintendent to be given first the authority to determine who fits the description he has established and then have the right to determine whether the "nature of the project" on which I may be engaged, with permission of a prisoner, is acceptable to the prison authorities.

The writer's freedom to study a problem such as the prison system and prisoners is as essential a part of freedom of speech as is the protection extended to newspaper, television, and radio representatives. But A.B. No. 72/40 restricts scholarly or journalistic work to that approved, in advance, by the warden, giving the warden a right no one else in the society possesses, and one which has no relationship to the proper functioning of a prison. If the right of a Time reporter to interview a prisoner does not disrupt the prison system, then my right is equally valid, and perhaps even more so.

Similarly, the six month limitation on interviews is another abridgement of my rights and those of the prisoners. In no situation such as an interview of the kind I carry on, would it be possible for me to gather the material I would need in one interview session. Normally, it might take three or four such sessions, and I do not believe the warden or superintendent has the right to determine the character of the work I do.

For these reasons, I believe that A.B. No. 72/40 as interpreted by R. K. Procunier is a fundamental abridgement of my rights, those of the prisoners, and of society in general, since cutting off access to the prison means that the public is cut off from access to one of the major problems it faces.

Paul Jacobs
/s/ Paul Jacobs

[Jurat Omitted in Printing]

[Exhibit C]

AFFIDAVIT OF EVE PELL

State of California
City and County of San Francisco—ss.

Eve Pell being duly sworn deposes and says:

I graduated from Bryn Mawr College, Bryn Mawr, Penna., in 1958, *cum laude* and with honors. After several years of teaching school, I became a free lance writer. I am co-author of *To Serve the Devil,* a history of minorities in the United States published by Random House in 1969, and editor of *Maximum Security: Letters from Prison* (E. P. Dutton, 1971). I have writen articles for newspapers and magazines, both national and local. My work is included in several anthologies: *Politics of Punishment,* edited by Erik Wright (Harper and Row, 1973); *Law Against the People,* edited by Robert Lefcourt (Random House, 1971); *If They Come in the Morning,* edited by Angela Y. Davis (Third Press, 1972), and a recent collection of writing about prisons edited by Ramparts Press.

As a free lance writer, I am seriously handicapped by the California Department of Corrections regulations concerning interviews between consenting prisoners and news media representatives. As one who has specialized in research and investigation into the California prison system for the last three years, and in studies of minority people before that, I have more background and experience, and therefore more capac-

ity to evaluate prison situations than most other reporters. Denying free lance writers access to interviews with prisoners is discriminatory, and blocks qualified observers from interviewing prisoners, while allowing general reporters, who happen to work full time for certain publications, to do so. The regulation restricts serious, sustained coverage of developments in the correctional system.

Because the general public is excluded from prisons, a free flow of information via the media is crucial if there is to be an informed electorate. The public is just now becoming aware that serious difficulties exist in our correctional system; in order to reach intelligent decisions about legislative and other proposals concerning prisons, a maximum of information is required.

Without access to varying kinds of media representatives, prisoners will be unable to express their opinions and evaluations of the correctional process, while the authorities are free to publicize theirs.

Free lance writers, by the nature of their work, can take the considerable time required to gain expertise on such institutions as prisons, since they are not simultaneously involved with other news stories demanding their time and attention. It seems manifestly unfair to me that such writers, because they are forbidden to interview prisoners, should be penalized for the occupation they have chosen to pursue.

Saturday Review asked me many months ago to write an article which requires an interview with

Johnny Larry Spain. Because of the California Department of Corrections' Rules, I have been unable to interview Mr. Spain, and unable to complete the article for *Saturday Review*. This seems to me to be an infringement of Mr. Spain's First Amendment rights, of my rights as a journalist, and undue interference with information about a public institution.

/s/ Eve Pell
Eve Pell

[Jurat Omitted in Printing]

[Exhibit D]

[Caption Omitted in Printing]

AFFIDAVIT OF BOBBY BLY

Bobby Bly, being first duly sworn, deposes and says:

I am a prisoner presently incarcerated in San Quentin State Prison and I am a named plaintiff in the civil rights lawsuit, *Hillery v. Procunier*. I joined in this lawsuit as named plaintiff in order to restore my constitutional rights, protected under the First Amendment to the U.S. Constitution. These rights should allow me to see and talk with representatives from the media and express my views on different topics freely, as well as fully describe the conditions I am being subjected to as a black prisoner.

On or about September 3, 1971, I was taken from my regular cell in the mainline population and placed

in A-section, which at that time was being used as a punitive segregation unit where conditions were far worse than on mainline. Though I was never given full notice of why I was being punished I was told that I was not receiving the customary disciplinary write-up. But, I was being so punitively treated because of my so-called "past record" and "militant beliefs". As a matter of fact, my disciplinary record has been quite good soince at San Quentin and I had received only minor write-ups for a long period of time prior to the transfer.

Briefly, the conditions that I was subjected to in lock-up included practically 24 hour a day lock-up exercise was cut off for weeks totally and then stringently limited for months because of this segregation confinement. I was not allowed to work or participate in any of the regular vocational, academic, recreational or educational programs. Furthermore, over this period of time I had serious medical problems and was not properly treated and subsequently have had a heart attack though I am young and had been in good physical condition.

The reasons why I was locked-up had very little to do with my behavior, beliefs or actions, but instead were caused by vague and unsubstantiated charges such as holding militant beliefs. I am a black man, that is true and I try to maintain myself with respect, integrity and dignity. I do feel that oftentimes prisoners are treated unfairly and oftentimes black and other minority peoples are discriminated against. I have never engaged in any illegal activities, militant

in nature or otherwise, as has been intimated while incarcerated in prison.

During this period of time, I had wished to (and I still do) communicate the facts of my confinement and the fact that most of the 200 men punitively locked-up were black and brown. I filed a lawsuit on this matter, also in federal court and the suit is still pending. I thought that it was important to speak with Betty Segal of the Richmond publication, *The Freedom News,* and inform the public of the actions I believed were illegal. The most important of these was that the confinement in segregation was unfair. A restriction, such as proposed by the Department of Corrections as elaborated in the Affidavit of R. K. Procunier, on prisoners incarcerated in lock-up units, or charged with disciplinary infractions or in segregation would prevent communication of one of the most common abuses in prison. I would like to stress that I was confined without just cause in such a unit, not for a few days or even for a few weeks but for many months.

It is not in fact the case that those insegregation are always subject to disciplinaries, oftentimes prisoners are confined such as myself, without any charges whatsoever. Sometimes it is because there is trouble in the institution, a transfer is imminent, or one has just arrived from another institution, or one is unassigned (through no fault of the prisoner), or under the umbrella category, 'for institutional convenience".

It is furthermore oftentimes the case that classification procedures are hasty and not careful at all.

For example, on most occasions when I went to the Classification Committee, the interview was less than 5 minutes, I was never told why I was being held or what specifically I did. Charges of "wrong beliefs" cannot constitute a careful screening. Review often comes after very long intervals, frequently 90 days.

Even during the period I was segregated I don't believe I was ever considered recalcitrant, obstreperous or dangerous, nor a security risk or extremely difficult problem. In fact, I was given a parole date during this period.

If news media representatives were strictly limited as suggested by Mr. Procunier, my first amendment rights to communicate with the press would be virtually obliterated. This is because of a number of different factors. Though I would have been anxious to communicate to daily papers or national magazines, I have no access to such publications, and as far as I understand they would not come to talk with me. I do not have the ability of calling press conferences, making phone calls etc. as do individuals on the outside, nor do I request such things. It is however, exactly such publications as *Freedom News,* which is smaller in circulation and directed to a more limited community that is interested in speaking with me.

Furthermore, by excluding such publications, also eliminated would be most publications designed for such minority communities as is generally serviced by smaller publications like *Freedom News* or the *Sun Reporter.* Though there financial resources are smaller than the *Chronicle* and they cannot afford to

publish daily, for example, they still report the news and communicate to the public.

Dated: December, 1972

/s/ Bobby Bly
Bobby Bly

[Jurat Omitted in Printing]

[Exhibit E]

AFFIDAVIT OF ELIZABETH SEGAL

Freedom News and the Right of News Access to Prison Inmates

The Freedom News, of Richmond, is a small monthly newsmagazine which attempts to present a critical, in-depth look at some of the issues of the day, based on first-hand reporting and investigation by persons who are wminently qualified yet possess no official press credentials. Some are college professors, some are graduate and undergraduate students, and some merely citizens who have expertise in some particular field which they write about. In no case can these people obtain regular press credentials. Nevertheless, the wuality of reporting done by them has been of consistently high quality, so much so that anthologies of small newspapers, university libraries, and other students of the news media have praised Freedom News for the excellence of its coverage in the past three years.

There is no more serious social issue today than the state of our prisons and the nature of prison inmates.

The prison issue has been clouded with accusations and counter-accusations, with mysteries and intrigue. The direction of prison reform, and the rapidly growing degree of public interest in this topic, has resulted in Freedom News devoting some space to these matters in every recent issue. The November issue carried a very penetrating interview with David Hilliard; previous issues have explored some of the mysteries connected with the celebrated Soledad case that finally ended in the death of George Jackson.

There is no substitute for first-hand information, and no proof that to read a story in a large daily newspaper means to have access to the relevant facts. We consider it imperative to have first-hand, direct access to interview prison inmates in selected cases, not for purposes of rabble-rousing, but in order to shed light on these cloudy matters of controversy with the aim of eventually working toward solutions, hopefully non-violent ones. It is for this reason above all that Freedom News is a party to this lawsuit.

I have been an editor, trainer of apprentice reporters, and staff writer for the Freedom News, of Richmond, since its beginnings in 1967. I have assisted the publisher, Mayer H. Segal, in finding out what the surrounding community is interested in reading and in attempting to meet those interests in my own reporting.

My tools have been personal research and direct investigation, for which I believe there is no substitute, and I have trained students in interview techniques. I have been closely connected with efforts in this

county to make lasting changes in the penal system and the county jail, and by that route I became acquainted first with some of the problems now connected with the state prison system.

I share with a number of other reporters the feeling that there are mysteries still connected with recent violent events, about which we shall never know the important truths until the press has access to all prisoners who may have some light to shed on these matters. I have never been an advocate of violence or engaged in any act outside the law, nor do I intend to do so now. But it is my belief that until the public has a chance to learn the truth about prisons in this state, serious injustices may be perpetuated, and violent confrontation may be in store. The role of the press is to provide full disclosure so that the public, and the decision-makers, may proceed toward a just resolution of the present impasse.

/s/ Elizabeth K. A. Segal
Elizabeth K. A. Segal

[Jurat Omitted in Printing]

[Exhibit F]

(Letterhead of Stanford University
Stanford, California 94305
Department of Communication
Redwood Hall Telephone: 415/321-2300 Ext. 4903)

David L. Grey
Assistant Professor

January 4, 1973

Richard M. Doctoroff
Patti Roberts
Law Office
558 Capp Street

I have had a chance to read and re-read carefully the Department of Corrections' definitions of news media representatives. Several comments seem very much in order.

I am writing as an individual scholar without any attempt to give the endorsement of Stanford University to these views. I am a 1957 graduate of the University of Michigan and have my doctorate in journalism and mass communication from the University of Minnesota in 1966. My degree program included extensive work in public law in political science, communication and law school courses. My dissertation studied in detail mass media coverage of the United States Supreme Court; it was published as a book in 1968 by Northwestern University Press, *The Supreme Court and the News Media.* I have taught courses in reporting of public affairs and

reporting of legal affairs and in mass communication law over seven years at Stanford and Northwestern University, 1965-present. Prior to that time and graduate work at Minnesota I was involved as a reporter and news editor for three publications, including The Wall Street Journal and as a temporary state capitol reporter for Booth Newspapers in Lansing, Michigan.

As a former working newsman, I find the definition to be much too vague and sweeping. If I were part of a press corps where it was being used, I would be among those willing to challenge it. As a scholar in the field of mass media and communication, I feel even more strongly: The wording strikes me as unfair and unconstitutional. The grounds would be vagueness and excessive arbitrariness, or so I would challenge them. I am sure part of the problem is unintentional; but whatever the causes, the situation strikes me as unsatisfactory and in need of immediate remedy.

Not only would Paul Jacobs be affected (I have read an early version of his thoughts on this matter) but also many, many other writers, indeed. Two which come to mind would be Truman Capote, *In Cold Blood,* and Howard James, *Crisis in the Courts,* the prize-winning book based on articles which first started to appear in The Christian Science Monitor. These are examples of free-lance journalism which could be seriously constrained by the definitions in paragraph 2 of the Nov. 6, 1972 Bulletin No. 72/40.

Many of the reporters accredited for the Angela Davis trial last year in Santa Clara County were

part-time correspondents for a variety of media, publications. Only constraints of numbers interferred with "accredition"; rightly avoided then (and should be now) were value judgments about what is the Established Medium. For example, would the San Francisco Bay Guardian be left out? It would seem so. Writers for more academic journals such as Science or Trans-action? These illustrations among the many possible should be enough to document the inadequacy of the present definition.

All of this depends, of course, on the willingness of inmates to be interviewed. The burden of deciding whether an interview should be granted should, in most cases, rest with the inmate in consultation with his attorney. Department officials should not be given the power to say who is or is not "acceptable" for the inmate.

All of this is based (and firmly) on the First Amendment and the public's right and need to know. I know of no policy or existing law which would support the position taken by the Department because it prevents the flow of information in a democratic society. Some of the best and most responsible and important journalism is being carried out by independent writers and documentary film and news makers. And, of course, by members of the so-called non-Establishment press—both full time and part time. If the purpose of the statement is to try to keep out such representatives from The Berkeley Barb or Tribe or its like, then the statement ought to have the courage to say so and try to defend itself against the obvious implications:

the statement is even-more-than-ever subject to formal challenge on constitutional grounds as discriminatory, biased—and restrictive of our so important and basic First Amendment rights of free speech and freedom of the press.

Put in a slightly different way, the Nov. 6 statement strikes me (again, probably in large part unintentionally) as in no way representing democracy. Apart from interest as a former newsman and scholar in the field, as simply a citizen of California I feel the statement is as repressive and inhibiting of civil liberties and the right to know as any document I have ever seen from my state government. Journalists have the mandate to help me understand where my tax dollars are being spent and what governmental priorities may be; the definition of news media representative simply restricts my access to information because, in this situation, not everyone can interview inmates and journalists of all kinds are meant under the First and Fourteenth Amendments to be my "representatives." They are no less important in this situation than legislators and others given the power of certain kinds of essential-to-democracy information-gathering. In fact, we know that they need special rights of access (where defendant's or prisoner's rights are protected) as a means of balancing and checking on our legislative, judicial and executive institutions.

Sincerely,

/s/ David L. Grey

Assistant Professor

[Exhibit G]

(Letterhead of Stanford University
Stanford, California 94305
Department of Communication

Redwood Hall Telephone: 415/321-2300 Ext. 4903)

January 12, 1973

Richard Doctoroff
588 Capp Street
San Francisco, California 94110

Dear Mr. Doctoroff:

This is in reference to the Department of Corrections' regulations stated in Administrative Bulletin 72/40. I consider those regulations to be far too restrictive.

I have worked as a journalist and have written extensively on the performance and the responsibilities of the mass media. I am attaching biographical notes that list such books as *Responsibility in Mass Communication* and *The Mass Media and Modern Society.*

I am now a part-time journalist. I write four articles a year for *The Progressive* magazine. (Several articles are cited in the attached biographical notes.) If I were to attempt to write an article that required interviews with inmates, I would be excluded.

Perhaps more to the point is the case of a close friend, Ben Bagdikian, who writes extensively on prisons. While he was assistant managing editor of *The Washington Post,* Bagdikian wrote an eight-part

series of articles that required extensive interviews with prisoners. The series was later issued as a book. Bagdikian is now a free-lance writer. He is writing another book on prisons. The regulations exclude him.

It must be obvious that the regulations are unduly restrictive. Although I am aware that regulations are necessary, those too closely drawn fail to serve the prison system, the prisoners, the media, and, worst of all, a public that must be informed.

Sincerely,
/s/ William L. Rivers
William L. Rivers
Professor

WLR:csn
enclosure

William L. Rivers
Department of Communication
Stanford University
Stanford, California 94305
Telephone: 321-2300, Ext. 4903

665 Alvarado Row
Stanford, California
Telephone: 326-8355

BIOGRAPHICAL NOTES (January, 1972)

Born March 17, 1925, Gainesville, Florida. Served in the U.S. Marine Corps, 1943-1946.
Married: two daughters, 20 and 17

Education

BA (1951) and MA (1952) degrees from Louisiana State University Ph.D. (1960) in political science from American University, Washington, D.C.

(Dissertation: "The Washington Correspondents and Government Information")

Fellowships and Awards

American Political Science Association Congressional Fellowship; 1954-1955

NATO Fellowship for Oxford Seminar on International Organizations; summer, 1956

Southern Fellowships Fund grant to further Ph.D. study; summer, 1956

World Affairs Fellowship, University of Denver; summer, 1957

Leadership Training Awards in the Mass Media (Ford) grant; 1958-1959

Distinguished Teaching Award, University of Texas, 1962

Sigma Delta Chi Distinguished Research Award for *The Opinionmakers;* 1966

Mellett Fund Award for press council experiments, 1967 and 1968

Consultantships and Special Research

Consultant to the Education Program of the Ford Foundation; summer, 1960

Interviewer for "Federal Political Executives" study, Brookings Institution; 1960

NATO Fellowship for research in Western Europe; summer, 1963

Consultant, (A.I.D.) research in East Africa; summer, 1964

Consultant, the RAND Corporation, for mass media studies; 1968-1969

Consultant, the Twentieth Century Fund; 1969-1970

Teaching Experience

Louisiana State University; 1953-1954

University of Miami (Florida); 1955-1958

University of Texas; 1959-1960 and 1961-1962

Department of Communication, Stanford University, September 1962-present

Professional Experience

Fulltime

Washington Correspondent, *The Reporter;* 1960-1961

Reporter, editorial writer, and relief city, wire, and Sunday editor, *Morning Advocate,* Baton Rouge, Louisiana; 1954

Reporter and editorial columnist, *News-Herald,* Panama City, Fla.; 1952-1953

Reporter and editorial writer, *State-Times,* Baton Rouge, La.; 1950-1952

Part-time

Media Columnist, *The Progressive* magazine; September, 1971-present

Election Manager and News Analyst, Network Election Service (three networks and two wire services); 1964 and 1966

Election Analyst, NBC News; 1960 and 1962

Florida correspondent, Kiplinger Letters, Miami, Florida; 1958

Publications

Books

Backtalk: Press Councils in America (with three co-authors), Canfield Press; February, 1972

Free-lancer and Staff Writer: Writing Articles for Magazines, Rinehart Press; January 1972

A Region's Press: Anatomy of the Newspapers in the San Francisco Bay Area (with David M. Rubin); Institute of Governmental Studies, University of California, Berkeley; 1971

The Adversaries: Politics and the Press, Beacon Press; 1970

Responsibility in Mass Communication (with Wilbur Schramm); Harper & Row; 1969

"The Press and the Assassination," in *The Kennedy Assassination and the American Public* (Greenberg, Bradley, and Edwin Parker, eds.); Stanford University Press; 1965

The Mass Media and Modern Society (co-author with Theodore Peterson and Jay Jensen), Holt, Rinehart & Winston; 1965 and (second edition) 1971.

The Opinionmakers, Beacon Press; 1965

The Mass Media: Reporting, Writing, Editing, Harper & Row; 1964

Articles

"The New Confusion," *The Progressive;* December, 1971

"Who Shall Guard the Guards," *The Progressive;* September, 1971

"Notes from Underground," *Columbia Journalism Review:* Spring, 1971

"Underground Appeal," *The Progressive;* February, 1971

"The Journalism Schools: The Media as Teacher," *Change, The Magazine of Higher Education;* March-April, 1971

"The 'Chronicle:' Schizophrenia by the Bay" (with David M. Rubin), *Columbia Journalism Review:* Fall, 1969

"California's Press: New Winds in the South, New Splash in the North," *Saturday Review;* September 23, 1967

"Jim Crow Journalism," *Stanford Today;* Autumn, 1967

"The Washington Correspondents After 25 Years," *Columbia Journalism Review;* Spring, 1962

"The Gonzales Victory," *The Reporter;* November 11, 1961

"The Foreign Policy of John J. Rooney," *The Reporter;* June 22, 1961

"The Politics of Pollution," *The Reporter;* March 30, 1961

"The Businesslike Mr. Hoffa," *The Reporter;* February 2, 1961

"Segregation Costs Money," *The Reporter;* December 8, 1960

"The Margin of Victory," *The Reporter;* October 27, 1960

"Brann the Iconoclast," *History III;* September, 1960

"Paradise on the Installment Plan," *The Reporter;* October 15, 1959

"The Long, Long Trail," *The Reporter;* July 21, 1959

"Congress Still Has Its Wits," *The New York Times Magazine;* May 17, 1959

"On the Shifting Sands of Miami Beach," *The Reporter;* December 25 1958

"William Cowper Brann and His 'Iconoclast'," *Journalism Quarterly;* Fall, 1958

"The Triumph of Trivia," *Nieman Reports;* July, 1958

"The Fine Art of Moderation," *The Nation;* December 21, 1957

"Common Market: The American Stake," *The Nation;* May, 1957

"Europe's Common Market," *The Nation;* January 19, 1957

"Why Congressmen Can't Do Their Jobs," *This Week;* January, 1956

"Florida: The State with the Two-way Stretch," *Harpers;* February, 1955

(Other articles in *The Reporter, Public Opinion Quarterly, The Progressive, Writer's Digest, Reader's Digest, Buick Magazine, Ford Times,* and *The Diplomat*)

[Exhibit H]

(Letterhead of
Office of the Director of
Psychiatry (Prison Health Services)
Health Services Administration
377 Broadway - Room 302
New York, New York 10013
566-4828, 4829, 4909)

Frank Rundle, M.D.
Acting Director

December 26, 1972

Richard Doctoroff, Esq.
558 Capp Street
San Francisco, California 94110

Dear Mr. Doctoroff:

My attention was recently directed to the recently issued administrative orders of the California Department of Corrections, designed to regulate interviews of inmates by news media representatives. In particular, I am concerned about the order prohibiting interviews with any inmate adjudged to be "psychotic".

Based upon my expertise as a board certified psychiatrist and my experience as Chief Psychiatrist at

the California Correctional Facility, Soledad, California and my knowledge of the California Corrections Department and Correctional Institutions in general, I would like to register my objection to such a procedure.

1. The term "psychotic" is imprecise which would allow its application broadly.

2. The decision as to whether an inmate is "psychotic" presumably would be made by the psychiatrists within the Corrections Department who by and large place institutions needs above those of individuals. Also, they are subject to pressures from custodial personnel to use psychiatric procedures for custodial ends.

3. There is no logical reason to discriminate against the "psychotic" inmate in this manner. The only conceivable logical reason would be that an interview with a news media representative would be harmful to the inmate and that the inmate would not have the mental capacity to recognize the danger. I am unable to imagine circumstances in which the above hypothetical reason could apply. In fact, I would say that an interview with an interested person whether news media representative or not would have a beneficial effect upon any inmate, whether "psychotic" or not, since it would at least for a brief time offset the psychologically devastating effect of isolation from the community which is imposed by prison.

If I can be of any assistance in your efforts to protect the rights and interests of the most helpless

of the helpless, the mentally ill prison inmate, please call upon me.

Sincerely yours,
/s/ Frank L. Rundle, M.D.
Frank L. Rundle, M.D.
Acting Director
Prison Mental Health Services
Health Services Administration

[Exhibit I]

[Visiting Privileges, November 1, 1972, which are Printed *supra* at pages 100-104, Omitted in Printing]

[Exhibit J]

[The Opinion in *Washington Post Co. v. Kleindienst,* which is now Reported at 357 F.Supp. 779, Omitted in Printing]

[Exhibit K]

[The Order in *Washington Post Co. v. Kleindienst,* which is now Reported at 447 F.2d 1168, Omitted in Printing]

[Exhibit L]

[Title Page Omitted in Printing]

Research Report No. 46

Explorations in Inmate-Family Relationships

Norman Holt
Associate Social Research Analyst
Southern Conservation Center

Donald Miller
Associate Social Research Analyst
Los Angeles Research Unit
Research Division
California Department of Corrections
Sacramento, California

January 1972

SUMMARY

Some Conclusions and Implications

The central finding of this research is the strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison.

Only 50 percent of the "no contact" inmates completed their first year on parole without being arrested, while 70 percent of those with three visitors were "arrest free" during this period. In addition,

the "loners" were six times more likely to wind up back in prison during the first year (12 percent returned compared to 2 percent for those with three or more visitors).

For all Base Expectancy levels, we found that those who maintained closer ties performed more satisfactorily on parole.

This suggests that it might be well to view the inmate's family as the prime treatment agent and family contacts as a major correctional technique. This approach has numerous advantages not the least of which is that it's free. It wouldn't require the specially trained staff or costly staff augmentations so common to most treatment approaches.

A second major advantage is the built-in inmate motivation. Most treatment techniques have limited value because the inmates most in need are also the least motivated for treatment. Motivation for visits is consistently high.

There are two areas in which changes might increase correctional effectiveness through promoting strong family ties. First, there are several ways in which special programs could become more effective. Most extensive use should be made of temporary releases. Their potential seems almost unlimited. Temporary releases should be used as pre-release preparation throughout the entire period of incarceration. Home leaves beginning a few months after reception would go a long way toward promoting strong family ties. Home visit privileges should be extended to a few non-violent, married prisoners in low risk categories

on an experimental basis and slowly be granted to other groups.

The Family Visit Program should be reserved strictly for those inmates who cannot make use of temporary releases. These would probably include such cases as chronic parole absconders, perpetrators of very violent crimes such as murder, or inmates who need to work out marital problems in a more structured setting than is provided by the home. Since common-law marriages are increasing in prevalence, those of some duration should be recognized in both programs.

Family counseling should be utilized more with each institution required to have at least one person as a State-certified family counselor who would be designated as the coordinator for the program.

The second area concerns routine institutional procedures. The further visitors have to travel and the more difficult the procedures, the more likely are the visitors to reduce contacts as the sentence is served. Thus, every effort must be made to place the inmate in the institution closest to his home in order to facilitate family contacts. This research has shown the high cost in terms of parole failure of interfering with important social ties. Correctional systems can no longer afford to incarcerate inmates in areas so remote from their home communities as to make visiting virtually impossible. Proximity to the inmate's home should be the first consideration in making assignments to institutions.

All correctional institutions in California, like most institutions throughout the world, make arrangements for inmates to visit and correspond with their family

and friends. Although such arrangements have existed since the beginning of prisons in this state, little systematic information is available about the nature and consequences of these outside contacts. This research project was undertaken as an exploratory study of the effects of these contacts on the inmate in prison and later on parole. The data for this study were obtained from inmate files at the Southern Conservation Center. The question was also raised of the effects of the Family Visiting and Temporary Release Programs at the California Correctional Institution. Some general information on marital status and patterns of outside contact is presented in the report as an introduction to the discussion of the influence of these contacts on the individual as inmate and as parolee.

Summary of Findings

- *Prisoners are less likely to be married than the average male.*
- *Patterns of outside contacts reflect the differences in family structure of different Ethnic groups.*
- *In general, contacts with family and friends do not necessarily decrease as the time is served. Marital ties are an exception, however.*

  Contacts with legally married wives of first term inmates grew fewer through the second year, suggesting that the marital relationship erodes as the years in prison pass.

  Given what appears to be a major deterioration of marriages after the first and second year of prison (about one-fourth fewer of the wives were

still visiting after three or more years), it is surprising that a hard core of wives continues the same level of contacts through four years plus and on into the second or third prison term.

- *Frequent visits don't seem to improve the inmate's institutional behavior but do lead to better parole plans and a better chance of being paroled.*
- *Inmates who maintained frequent outside contacts while in prison did significantly better on parole.*

A twelce-month parole follow-up study of 412 men paroled from the Southern Conservation Center in 1968-69 revealed that men with more people visiting them during their last 12 months in prison experienced significantly less difficulty and less serious difficulty in their first year of parole than did those with fewer visitors.

Men who had more people visiting them in prison experienced fewer difficulties on parole regardless of Base Expectancy Score. However, in the lower score range (00-32), the difference was small, and the Base Expectancy measure seemed more predictive of outcome for those with more numerous visitors.

- *Family Visiting and the Temporary Release Programs were strongly supported by the inmate body with no hint of negative reactions from those who couldn't participate.*

All restrictions on visitors and mail should be closely scrutinized with an eye to eliminating all regulations

whose purpose is other than protecting the absolute basic security of the institution. No restriction should be allowed to remain the only reason for which is the lack of space. Space must be found. The effectiveness of family contacts is such that very high priority should be given to finding space that may be utilized to increase the frequency of family contacts.

Chapter VIII. The Inmate and His Family: Some Conclusions and Implications

Any serious look at the end results of correctional programs is likely to be discouraging. Immediately the investigator faces the problem of trying to define "correctional programs," as the term has become so broad as to include almost everything convicted criminals are required to do in the course of their imprisonment. A second difficulty is the virtual absence of any theoretical basis for the programs. After a review of current correctional techniques, Cressey concluded that not only had their effectiveness not been demonstrated but that the techniques were "only vaguely related to any reputable theory of behavior or of criminality."[1] Empey observed that most such programs, rather than being derived from theoretical constructs, are usually based on an "intuitive opportunism," involving a kind of goal-oriented guessing which develops into a strategy of activity.[2]

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[1]Cressey, D.R., "The Nature and Effectiveness of Correctional Techniques," *Law and Contemporary Problems*, Vol. 23, No. 4, Autumn 1958.

[2]Empey, L.T., "A Strategy of Search," paper presented at the planning session of the Pacific Sociological Association on the Technical and Ethical Problems Involved in Evaluating Action Programs, Salt Lake City, April 1965.

A third area of frustration involves the inability to find empirical evidence showing any significant value for the great majority of current techniques of correctional intervention.[3] Commenting on this lack of demonstrated effectiveness, Ward remarked:

> "University investigators should find little comfort in the fact that while treatment evaluation results are not much to take to the legislature, the implications for the sociological and psychological theories underlying these programs are not much to take to their professional meetings. With the investment that all parties—prison and parole departments, treatment specialists and theoreticians—have in evaluations of correctional programs, there is no question that what would be helpful to all concerned, including the objects of treatment, would be the report of a prison treatment program that really worked."[4]

At this point in our knowledge it seems fair to say that there are few correctional techniques whose proven value is such that their application would represent a significant improvement over doing nothing at all. To compound the difficulty most of these unproven techniques require high staff ratios or in some other ways consume large amounts of scarce correctional resources. It is against this bleak backdrop that the implications for corrections of the find-

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[3]Robison, J. and G. Smith, "The Effectiveness of Correctional Programs," *Crime and Delinquency*, Vol. 17, No. 1, January 1971.

[4]Ward, D.A., "Evaluation of Correctional Treatment: Some Implications of Negative Findings," paper read at the First National Symposium on Law Enforcement Science and Technology, Chicago, Illinois, March 1967.

ings of this study relating to inmate social ties will be discussed.

Do Family Contacts Increase Parole Success?

The central finding of this research is the discovery of a strong and consistently positive relationship between parole success and the maintenance of strong family ties while in prison. The reliability of this finding is substantiated by the results of other research undertakings. The earlier of these efforts was conducted by Lloyd Ohlin in the course of developing a parole success prediction scale for Illinois. Ohlin developed an index of family interest while in prison to capitalize on the belief of many parole agents that parolees with closer family ties tended to do better. Using a sample of releases from 1925-35, he found that 75% of the inmates classified as maintaining "active family interest" while in prison were successful on parole compared to only 34% for those regarded as loners.[5] Glaser used Ohlin's classification technique with a sample of 1956 releases from federal prisons with very similar results. He found that 71% of the "active family interest" group were successful compared to only 50% of the "no contact with relatives" group.[6] In an earlier study of 1940-49 releases from the Pontiac Branch of the Illinois State Penitentiary, which has a reformatory type population, Glaser found a 74% success rate for the "active inter-

[5]Ohlin, L.E., *The Stability and Validity of Parole Experience Tables*, (Ph.D. dissertation) University of Chicago, 1954, cited in Glaser, D., *The Effectiveness of a Prison and Parole System*, Bobbs-Merrill, Inc., New York, 1964, p. 366.

[6]Glaser, op. cit., p. 366.

est" group and a 43% rate for those parolees without contacts.[7]

This study found very similar percentage differences between groups. Only 50% of the "no contact" inmates completed their first year on parole without being arrested, while 70% of those with three visitors were "arrest free" during this period. In addition the "loners" were six times more likely to be returned to prison during the first year (12% returned compared to 2% for those with three or more visitors). The convergence of these studies should be emphasized. Ohlin's study focused on inmates paroled in Illinois over a ten-year period. Glaser's work replicated Ohlin's findings with releases during one year from federal prisons as well as from a reformatory type population. The same results characterize our study's sample of 1969-70 releases from a minimum security institution in California. The positive relationship between strength of social ties and success on parole has held up for 45 years of releases across very diverse offender populations and in different localities. It is doubtful if there is any other research finding in the field of corrections which can approximate this record.

One of the major problems with the earlier studies, which the authors of this study tried to overcome, was the strong interrelationship among social ties, other important variables, and parole outcome. The unique contributions of this study in this regard was to show

[7]Ibid.

the independent contribution of family ties to parole outcome. The importance of family ties held up in an analysis in which six other important factors were considered.

Glaser postulated that the amount of release money was important to parole outcome.[8] We found this to be true only for those with few social ties. Difficulty on parole is somewhat predictable if the inmate has few contacts and less money. On the other hand, strong social ties appear to serve as an alternative material resource. Among those with many visitors the amount of release money assumed no importance. Among federal prisoners Glaser also found significant differences in parole outcome associated with differences in type of residence. However, similar differences in California largely disappeared when the number of social ties was held constant. There was not much difference in parole outcome among parolees planning different types of residences who received numerous visitors. The relationship didn't disappear entirely, however, since those parolees planning to live with parents or wives still had a slight advantage in parole success. For example, 8% of those who had two or more visitors and who were living alone on parole recidivated compared to 5% of their counterparts with plans to live with their parents or wives.

Similarly, employment prospects among federal prisoners were important to parole outcome, but with the

[8]Glaser, op. cit., p. 316.

imposition of a control for family contact, job offers were not important for the sample used in the present study. The importance of a job offer appeared to be primarily a function of the strength of the inmate's social ties. In other words, the presence of a job offer was unrelated to parole outcome when the inmate's social ties were taken into account, and the effects of social ties on parole success were independent of a job offer.

An alternative explanation of the findings of this study is that inmates receiving more visitors are less likely to recidivate anyway. In order to test this hypothesis, the authors divided the sample into three levels of predicted parole outcome and compared social ties and parole success within each. The predictive device was the California Base Expectancy Scale, which is based heavily on past criminal involvement. Within all Base Expectancy levels, it was found that those who maintained closer ties did better.

It might be claimed that, while other important variables were taken into account, inmates motivated to maintain strong social ties have some special motivation to succeed on parole. The same qualities which motivated the inmate to maintain frequent family contacts might have caused him to do better on parole. The data in Chapter V seem to invalidate this alternative explanation. If the results in parole outcome were caused by differential motivation, it would be necessary to hypothesize a somewhat generalized motivational difference. In other words, the difference in motivation ought to show up in other areas besides

visiting and parole outcome. However, this was not the case. Those who maintained frequent family contacts received about as many disciplinary reports, had no better work records, were no more likely to participate in treatment programs, and did about the same in group counseling. In summary, all the evidence suggests that there is a strong independent, positive relationship between maintaining frequent family contacts while in prison and success on parole. This evidence suggests that the inmate's family should be viewed as the prime treatment agent and family contacts as a major correctional technique. This approach has numerous advantages not the least of which is that it is free. It doesn't require the specially trained staff or costly staff augmentations so common to most treatment approaches.

A second major advantage is the built-in inmate motivation. Most treatment techniques, even if they work, have limited value because the inmates most in need are also the least motivated for treatment. The few who volunteer are often the same ones who would succeed without the program. The desire for outside contacts, by contrast, is a central part of the inmate's existence. The data in Chapter IV clearly show that when adequate opportunity is provided for contacts the inmate's social ties need not erode away. The contacts of our sample were about as frequent after several years of incarceration as during the first six months. The one important exception to this was that a significant number of wives stopped visiting during the second year. It is necessary to emphasize, how-

ever, that this study was done at a correctional complex which is located within easy commuting distance from where most of the inmates' families live and which has very liberal arrangements for visiting. It seems apparent that the further visitors have to travel and the more difficult the procedures for visiting, the more likely are the visitors to reduce contacts as the sentence is served.

Can Correctional Systems Help?

The next question is whether or not correctional systems can do anything to capitalize on the family's potential as a treatment agent. Chapter VII examined two experimental programs which aimed in this direction, the Family Visiting and the Temporary Release Programs. Both efforts are successful by almost any standard. Both enjoyed almost unanimous support from the inmate body. Almost all inmates hoped to participate, and those who couldn't were not resentful. Neither presented serious administrative problems. In addition, a follow-up study found that the participants in either program did better on parole than non-participants. Sixty percent of the participants experienced no difficulty during the first year of parole compared to only 42% of the non-participants. The number of participants was small, and the results must be interpreted with caution. However, the findings held up under the application of numerous control variables.

A final question about the temporary releases is whether they seriously threaten the public safety. Cur-

rently, thousands of inmates in California are being released each year on temporary leaves and experience has shown that they are involved in no more difficulty than would normally be expected during the first few days on parole.

Some Recommendations

There are two areas in which changes might increase correctional effectiveness through promoting strong family ties. First, there are several ways in which special programs could become more effective. More extensive use should be made of temporary releases. Their potential seems almost unlimited. Even with their rapidly expanding use in California, no limits have yet been found on who can benefit or the number of times benefit can be derived. The use of temporary releases as pre-release preparation should be extended to include the entire time of incarceration. Home leaves beginning a few months after reception would go a long way toward promoting strong family ties. Home visit privileges should be granted to a few non-violent, married prisoners in low risk categories on an experimental basis and slowly be extended to other groups.

The Family Visiting Program should be reserved strictly for those inmates who cannot make use of temporary releases. These would probably include such causes as chronic parole absconders, perpetrators of very violent crimes such as murder, or inmates who need to work out marital problems in a more structured setting than is provided by the home. Since

common-law marriages are increasing in prevalence, those of some duration should be recognized in both programs.

Family counseling should be utilized more with each institution required to have at least one person certified as a family counselor who would be designated as a coordinator. This person would be available as a co-leader for family groups as well as a consultant to other staff. This individual's availability should be made known to visitors so as to encourage their consultation with him.

The second area concerns routine institutional procedures. Every effort must be made to place the inmate in the institution closest to his home in order to facilitate family contacts. This research has shown the high cost in terms of parole failure of hindering important social ties. Correctional systems can no longer afford the expense of incarcerating inmates in areas so remote from their home communities as to make visiting virtually impossible. Proximity to the home community should be the first consideration in making assignments to institutions.

All restrictions on visitors and mail should be closely scrutinized with the objective of eliminating all regulations which are not necessary to promoting the absolute basic security of the institution. No restriction should be allowed to remain whose only reason is the limit in space. Space must be found. If some new correctional technique were invented tomorrow whose effectiveness were equal to family contacts,

there would be a rush to find space for implementation even if it meant using the warden's office. Wherever possible visitors should be allowed to bring a lunch and share it with the inmate. This avoids terminating the visit for the meal and also provides for visiting in a setting focused on a central family ritual. There are undoubtedly many other ways in which family contacts could be promoted.

Exhibit M

(Letterhead of State of California
Health & Welfare Agency)

Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor

January 12, 1973

Re: Hillery, Booker T.
A-32262

Mr. Mark Schwartz
2509 Dana Street
Berkeley, Ca. 94704

Dear Mr. Schwartz:

I just received your request to interview Mr. Hillery and am replying to same. In order to comply with your request we will require that you:

1. Please bring with you Mr. Hillery's request for interview so that we may verify that it is a valid request.

2. Your original visit with Mr. Duren in the visiting room was a courtesy on our part. We cannot, on an on-going basis, utilize the space set aside for family and friends to accomplish press interviews. It will therefore be necessary for you to reimburse the state for an escort officer to escort you into the institution and offer custodial supervision during the interview at a cost of $44.00.

Please advise me of your decision based on the above and I will then process your request.

Sincerely yours,
L. S. Nelson, Warden.

/s/ Lee E. DeBord
Lee E. DeBord
Information Officer

LED:ajr
[Certificate of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Feb. 7, 1973]

[Caption Omitted in Printing]

DEFENDANTS' SUPPLEMENTAL MEMORANDUM

Preliminary Statement

There is no doubt that the area of prison administration is extremely complex and, at the present moment in history, controversial. Experts do take

different viewpoints on the question of inmate interviews. California, however, entrusted the management of its prisons to the expert judgment of the Department of Corrections, and it is not the function of courts to substitute their judgment on questions of prison management for that of the prison officials charged by law with the responsibility for prison management.

In short, plaintiffs' disagreement with the expert judgment of the Department of Corrections does not render the Department's rules unconstitutional. On the contrary, the Supreme Court's recent decision in *Branzburg v. Hayes,* 408 U.S. 665, and other decisions and principles discussed below, demonstate that the Department's valid exercise of its authority to administer prisons does not "abridge" the "freedom of speech" of state inmates.

Argument

The Department of Corrections in Prohibiting News Representatives from Conducting Personal and Individual Interviews With Particular Prison Inmates, Does Not "Abridge" the Free Speech or Other First Amendment Rights of Inmates.

There is also no merit in the claim of the inmate-plaintiffs that the Department "abridges" their "freedom of speech" and other First Amendment rights. Inmates, of course, retain constitutional rights, but it is equally axiomatic that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retrac-

tion justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948). This axiomatic proposition has been uniformly applied by federal courts to uphold restrictions upon the activities of prisoners which, if they were free men, would enjoy constitutional protection. *Stroud v. Swope,* 187 F.2d 850 (9th Cir. 1961), *cert. denied,* 342 U.S. 829 (denial of right to engage in outside business activities); *Numer v. Miller,* 165 F.2d 986 (9th Cir. 1948) (denial of access to college correspondence course); *Sherman v. Meier,* 462 F.2d 609 (9th Cir. 1972) (denial of right of inmates to determine own hairstyle); *Caldera v. Mitchell,* Ninth Circuit No. 24838, order of affirmance January 8, 1970, *cert. denied,* 399 U.S. 930 (denial of right of prisoners to be married to each other); *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965) (control of prisoners' mail); *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964) (control of prisoners' mail); *Vida v. Cage,* 385 F.2d 408 (6th Cir. 1967) (restriction of inmate's communications with other prisoners); *McDonough v. Director of Patuxent,* 429 F.2d 1189 (4th Cir. 1970) (denial of correspondence with magazine and other outsiders for purpose of criticism of institution); *Sostre v. McGinnis,* 442 F.2d 178, 199-200 (2d Cir. 1971) (en banc), *cert. denied,* 405 U.S. 978 (control of prisoners' mail).

In particular, the federal courts have recognized that an inmate's communications with the outside world may be restricted in order to maintain prison discipline, and that the inmate's free speech and other

First Amendment rights are not violated by such prison regulations. As stated by the Second Circuit, *en banc,* in *Sostre v. McGinnis, supra,* 442 F.2d at 200: "Discipline and prison order are sufficient interests to justify such regulation incidental to the prisoners' speech." *See also, McDonough v. Director of Patuxent, supra,* 429 F.2d 1189, 1193 (4th Cir. 1967) (upholding prohibition of inmate's correspondence with national magazine and others to prevent adverse effect on "institutional control and discipline").

The foregoing principles mandate the rejection of the inmates' First Amendment contentions. The decision of the Department to prohibit particular inmates from granting individual interviews to the press is based upon the Department's determination that such a ban is necessary to maintain the discipline, custody and control of prisons, and such prohibition on individual interviews constitutes an appropriate exercise of its broad regulatory powers. As the Ninth Circuit declared in *Smith v. Schneckloth,* 414 F.2d 680, 681 (9th Cir. 1969):

> "It is . . . settled . . . that correctional authorties have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights."

The lack of merit in plaintiff's First Amendment claims is independently demonstrated by the fact that the Department of Corrections permits the written communication of inmate grievances, complaints and stories to the press. In view of this system of reason-

able access to the press, the Department's denial of one particular means of communication, namely, individual interviews with news representatives, does not "abridge" the "freedom of speech" or other First Amendment rights of inmates. *See also Smith v. Bounds,* Civ. No. 2914, E.D.No.Car., opinion dated March 14, 1972, where the district court upheld against a suit by inmates, a state prison rule barring inmate interviews with the press, noting (opinion, pp. 4-5: R. 389-390):

> "In light of the mail regulations of the North Carolina Department of Corrections, it appears that inmates have been provided with sufficient opportunity to correspond with the members of the media and to present their views to the public. In the light of such opportunity, it is not necessary that personal interviews must also be permitted."

There is no merit in plaintiffs' claim that the Department's rule is overly broad. Communications between prisoners and the press are not barred; it prohibits only direct individual press interviews with particular inmates. In view of the need to maintain prison discipline and order, this narrow restriction is not a constitutionally prohibited abridgement of First Amendment rights. *See Cox v. Louisiana,* 379 U.S. at 566, where the Supreme Court sustained a state's total ban on picketing near a courthouse when that ban expressed a legislative judgment—comparable to the judgment of prison officials in the instant case—"that such conduct inherently threatens the judicial process."

As the Supreme Court held in *Kovacs v. Cooper,* 336 U.S. 77, 88-89 (1949):

> "That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the home or business houses from the distracting noises of vehicle equipped with such sound amplifying devices justifies the ordinance."

See also Breard v. Alexandria, 341 U.S. 622, 644 (1951), where the Supreme Court held that free speech and free press were not "abridged" by an ordinance barring door to door soliciting notwithstanding a publisher's claim of a "right to distribute publications in the precise way that those soliciting for him think brings the best result." *Cf. Johnson v. Avery,* 393 U.S. 483 (1969) (recognizing that an appropriate system of alternative assistance to inmates would justify prison rules barring inmates from acting as writ-writers). *See also Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972), where the Supreme Court upheld a ban against distribution of handbills in the interior mall area of a large privately owned shopping center, noting that, "It would be an unwarranted in-

fringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."

Dated: February 6, 1973.

Evelle J. Younger
Attorney General of the State of California
Edward A. Hinz, Jr.
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/s/ John T. Murphy
Deputy Attorney General
Attorneys for Defendants

[Declaration of Service Omitted in Printing]

Volume 2 Pages 76 Through 155

In the United States District Court
Northern District of California

Before: Honorable Spencer M. Williams, Judge
Honorable O. D. Hamlin, Judge
Honorable William G. East, Judge

[Caption Omitted in Printing]

REPORTER'S TRANSCRIPT

February 14, 1973

Reported by:
William R. Johnston

Appearances:

For Plaintiffs:

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Patti Roberts, Esq.
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In Amicus Curiae:

Peter Sheehan, Esq.

[76] *Wednesday, February 14, 1973*

The Clerk: Hillery versus Department of Corrections.

Case No. C 71-2150, Brooker T. Hillery versus California Department of Corrections.

Counsel, state your appearances, please.

Mr. Murphy: John Murphy, Deputy California Attorney General, appearing for the defendant, Your Honor.

Ms. Roberts: Patti Roberts and Richard Doctoroff, appearing for the plaintiffs.

Peter Sheehan is here as amicus curiae.

Eve Pell, one of the plaintiffs is sitting at counsel table.

Mr. Sheehan would like to approach the bench initially.

Judge Williams: How do you spell your last name, sir?

Mr. Sheehan: S-h-e-e-h-a-n.

Your Honor, I am appearing on behalf of a number of representatives of the press. We filed an amicus curiae brief with this Court.

Judge Williams: I allowed that to be lodged.

I guess the Attorney General received a copy last Thursday, is that correct?

Mr. Murphy: Yes, Your Honor.

[77] I received it on Friday.

Judge Williams: I know that Monday was a holiday for the State.

Have you any objection to allowing the AC to argue this matter as long as you have an opportunity to file any responses?

Mr. Murphy: No objection to the filing of the brief or any argument which the AC wishes to make.

I would like an opportunity, if it pleases the Court, to file points and authorities in opposition to the memoranda. I believe all that would be necessary, as far as time would be ten days.

Judge Williams: All right.

Then we will allow the filing of this memo which has previously been lodged with this Court. We will

allow Mr. Sheehan to argue the matter and we will permit the State of California ten days in which to file points and authorities.

Mr. Sheehan: Thank you, Your Honor.

I will not be arguing the matter. It has been divided up into segments. It's going to be argued by one of the plaintiffs' counsel. Thank you, Your Honor.

Judge Williams: Ms. Roberts?

Ms. Roberts: Yes.

The case before the Court this morning raises the important competing public interests of the right of the [78] public to know and the concomitant right of the free and open dissemination of gathering of the news. This right, we understand, is correlative to the right of prisoners' freedom of speech.

The issue here is raised in the context of a Department of Corrections administrative manual rule, Section 415.07, which bans all press interviews with specifically designated prisoners in California prisons.

Judge Williams: Excuse me, Ms. Roberts.

Do you intend to argue these two points separately —the freedom of the press issue and the freedom of the speech issue?

Ms. Roberts: Yes.

I will be covering the freedom of the press issue and Mr. Doctoroff will be covering the issue of the freedom of the First Amendment as applied to prisoners.

Judge Williams: Thank you.

Mr. Doctoroff: Possibly, at the outset we might, for the record, delineate what is before the Court at this time.

My understanding is that this Court has before it the motion of the defendant to dismiss the complaint and also the motion of the plaintiffs for a preliminary injunction. I believe that is what is before the Court.

Judge Williams: Yes.

[79] We are covering the regulation, which was the subject of the initial suit, and we do not intend to get into the matter of the interim regulations today.

Mr. Doctoroff: That is my understanding.

Ms. Roberts: That is my understanding as well.

Initially, on September 28th, Judge Williams issued a preliminary injunction which declared that this administrative regulation was unconstitutional on the grounds that prisoners did have a First Amendment right and they did have a right to speak to authorized representatives of the press and the media.

The order was vacated due to jurisdictional grounds approximately one month after that and transformed into a temporary restraining order.

This happened when it became clear that the defendants' regulation was statewide and covered all California prison institutions and was not confined merely to San Quentin.

The interim regulations have been proposed by the Department and are now presently being discussed before Judge Williams. Certain of them are being applied within the prison complex.

While it is clear that conditions of confinement must be different than on the streets, that the prisons must be different than what we see outside, that the

prison administrators must be given a latitude in the administration [80] of internal affiairs of prisons, we also must recognize the right of prisoners' constitutional rights and that includes First Amendment.

This has been confirmed by the United States Supreme Court and by Federal authorities throughout the country. In Koffman v. Rightguard, the Court said:

> "A prisoner attains all the rights of an ordinary citizen except those expressly or by necessary implication taken by law."

We feel that the refusal of the Department of Corrections to allow press and media persons to interview prisoners restricts the important right of the public's right to know. We stress that it is the public's interest here that is at stake. It is not the stake of an individual newspaper person.

It's basic to a democratic system and our country's scheme of government that the people, the public have full knowledge of information and issues. The only way that this is possible in a complex society is through the press, as one of the most important ways, perhaps not the only way.

For the public to be making decisions on such important issues as crime and prison administration in the general context without adequate information makes that right, the public's right to govern, somewhat of a sham.

The press, we feel, in this role of supplier and [81] gathering and analyzing information serves what is a quasi-official role as a representative of the public.

In the United States Supreme Court in 1935 in the case of Brosaun v. American Press Co. the Court said:

> "The predominant purpose of the First Amendment was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and journals of the country have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity. And since an informed public opinion is the most potent of all restraints and misgovernment, the suppression or arrangement of the publicity afforded by the free press cannot be regarded other than with grave concern."

We feel that refusing to allow authorized and designated members of the press and the media entrance in to see prisoners at our prisons under appropriate security provisions would be a trammel on those important constitutional rights.

We have seen in recent years that prisons are a special concern. All people are worried about crime, rich people or poor people, whether it is people in the cities or in the country. The social and psychic costs of crime are certainly beyond calculation and the problem seems to be increasing.

[82] Prisons are the last step of the criminal justice system and in effect all Californians. Right now in California there are over 25,000 people confined in California's prisons. There are over 13 major institutions in California.

Judge Williams: I thought it was about 20,000 now.

Ms. Roberts: I think recently some of those statistics are going up. It is somewhere between 20 and 30, I believe.

There are also an increasing number of people who are paroled from those institutions. There are many camps and other facilities that these regulations would apply to, including those men on work furlough, and women, too.

It is important that the public be informed and the public deal with these problems.

Chief Justice Warren Burger has said:

> "When a sheriff or a marshal takes a man from a courthouse into a prison van and transports him to confinement for two to three to ten years, this is our act. We have tolled the bell for him and whether we like it or not, we have made him our collective responsibility. We are free to do something about him. He is not. This is the public's obligation to deal with this situation."

The Chief Justice has also repeatedly spoken of "a correction system that does not correct."

[83] Judge Williams: Excuse me.

Insofar as the freedom of the press point is concerned, are you arguing that the rights of the press are synonymous to the rights of the public or the press has some kind of a special access that the general public does not have?

Ms. Roberts: We are arguing that the press' rights under the First Amendment is the other side of the public right to know. That's not a complete right to

know. That's not a complete right to invade into areas of national security. It is not a right of the press, as representatives of the public to go into the prison in the midst of a riot, in the midst of a demonstration. We are not arguing that.

We are arguing that in order that the First Amendment right to freedom of the press and freedom of expression be protected, that the press has to have access into those prison systems. It is our argument that the——

Judge Williams: A greater access than the average member of the public has?

Ms. Roberts: We argue that the press is here representing the public, but the situation is such that we cannot have assorted members of the public just wandering into the prison. But the public is allowed into the prison in different forms. Relatives of prisoners are involved. Relatives of prisoners go into the facilities. They visit **[84]** with friends. Friends also go. Ministers go into the prison on a regular basis. There are tours, in fact, that go through the prison.

There are different groups that are permitted to go into the prison, talk to prisoners and construct programs. Members of the academic world go into the prison. That is the public.

The press is one additional aspect of the public.

Judge Williams: Are they entitled to go into and talk to a named prisoner?

Ms. Roberts: Pardon me?

Judge Williams: Would a member of the public be able to go in and, say, talk to Charles Manson?

Ms. Roberts: On occasions, members of the public are allowed into the prison facilities. Regulations have been changing all the time.

Initially, only long-term friends and relatives of prisoners were permitted into the prison. Now, it is our understanding, other people are allowed to visit on regular days and regular hours subject to the security and limitations of the prison.

Judge Williams: Are you arguing that the press has less rights than the public or the same rights?

Ms. Roberts: I think perhaps the San Quentin institution Order No. 300 explains some of the public's right [85] to know. This was a document attached to the Answers of the defendant Louis Nelson.

In this institution order, which covers the question of press and information, the prison says:

> "The public is 'in recognition of their right to be informed about the operations, problems, programs and goals of San Quentin and the Department of Corrections'"—pardon me—"and that the public includes both broad audiences reached by the news media"—now I am quoting from the order—"the broad audience reached by the news media and a large group of special public."

The prison concerns itself with these special publics and mentions lawyers, jurists, academics and other people in the community who have an interest.

The order goes on to say:

> "Community understanding of program objectives and their exceptions of program methods are vital to community relations."

It is in fact the institution and the Department's own contention that the public does have a right to know. We feel that the area in which press is excluded makes this right to know meaningless. To have press only being the recipient of prison administration press releases is not an adequate right to know. It does not cover the need of the [86] public to have both a balanced and comprehensive picture of prisons.

Judge Williams: I thought that other regulations allowed the press to come in and interview prisoners that they met walking around the facility, but the only ban that was under attack here was the prohibition of them to interview a specific named prisoner; that if they wanted to interview someone at an adjustment center, they would draw the name out of a hat and they would talk to a prisoner, but they couldn't specify the one they wanted to talk to; isn't that the regulation?

Ms. Roberts: The regulation that is before us specifically says that the press may not interview with specifically designated prisoners and does indicate that there is some move for individual members of the press. It does not make any specific definitions of who those press people are to be, but that they may go through the institutions and talk to people at random.

It is our contention that that does not deal with the First Amendment right to freedom of the press and expression and instead leaves discretion in the hands of prison administrators.

The prison officials have raised a number of reasons to justify this ban. They are: The needs of secu-

rity, the needs of internal administration, and also the big wheel theory.

[87] My colleague, Mr. Doctoroff, will go into those in greater detail.

In all the papers and arguments that we have had, never have any of these theories—though they are important and though those needs must be protected—never have we seen an explanation of why those needs are not met by secure press visiting.

We are talking about visiting of particular inmates in visiting rooms that are secured by guards, people have to go through metal detectors. We are not talking about the press being allowed into the prison and taking over that institution.

We feel that in order that the public have adequate information, a more balanced situation must be presented. It is not enough for just the prison to be able to explain their side of any story.

The public is repeatedly confronted with the need to know about those prisons. There are tens and tens of bills before the Legislature in this country and in California. There are committees in both the California House and the Senate. Those bills present different kinds of ways of dealing with prisoners, stretching from building more institutions, spending more money, to placing greater numbers of people on furlough. The alternatives are just increasing. Every year we have a new proposal for prisons.

[88] Finally, it is the public that must decide on that. Tens and tens of thousands of dollars are spent on prisons each year and an informed public is the

only way to make those kinds of distinctions and definitions and decisions about how that money is to be spent.

Judge East: Ms. Roberts, does the press intend that it has the right to review under appropriate security regulations a prisoner who does not wish to be interviewed?

Ms. Roberts: No.

Judge East: In other words, do they have the right to confront an unwilling prisoner?

Ms. Roberts: No.

The only prisoners we are talking about here are prisoners who have consented.

Judge East: Under the present TRO, which recognizes the right of the prisoner to speak if he wishes to speak, why doesn't that protect the press?

Ms. Roberts: We feel that legally and constitutionally there is a right of the press and that must be affirmed in the decision.

In the specific cases that have come before the Court, we have plaintiffs who are both members of the media and members of the prison population.

Judge East: Then let's extend that right a little further: Would the press contend that it has the right to **[89]** confront a specific prisoner to ascertain whether or not he wants to be interviewed?

Ms. Roberts: In the present situation, the way we understand the administration of the old regulation that bans specific——

Judge East: Under the TRO that absolute ban is enjoined. So the prisoner has the right to call in a member of the press.

Ms. Roberts: Under the temporary restraining order, the Department of Corrections have proposed interim regulations which do include the right——

Judge East: Well, they're under attack, too.

Let us assume that the prisoner's right is established, that he may be interviewed by a newspaper when he desires it, subject to security regulations that are reasonable, why doesn't that in and of itself protect the press and the public's right to know?

Ms. Roberts: Though the regulation that we would like to see in fact would only authorize press to speak to specific consenting prisoners, we do feel there is a legal right of the press and that should be established.

Judge East: To find out whether or not he wants to talk to the press?

Ms. Roberts: As the old regulation stood, which specifically excluded——

[90] Judge East: You won't accept my premise. My premise is that the prisoner does have the right to be interviewed if he wishes it. That's what the present TRO provides for.

Ms. Roberts: Under the old regulations, what in fact happened, apparently from the descriptions that we have been given, were that pressmen and women, as I understand were permitted to go through the institution and at random talk to people who were around. That meant in practice a person could go up to a prisoner and say, "Hello, I am Mr. Jones, of such-and-such a newspaper, I would like to ask you this:" At that time the prisoner, apparently, from

what we understand had the right to say "No, I don't want to talk to you" or "Sure, this is the situation."

So in that situation under the old rule, the press did have that right to talk to prisoners and to have them turn them down but also had the right to ask him.

Judge Williams: You mean the one under attack?

Ms. Roberts: Yes, the one that is under attack now.

Whereas, it did allow press to go through the institution and have the right to talk to press, it refused them the right to talk to specific prisoners.

In a situation like that, clearly the information gathered is going to be limited. There are prisoners inside who have never had an opportunity to see that press person. **[91]** We don't know where those press people were taken to in the institution.

As a matter of fact, though the prison raises the issue of security problems, it would appear to us that all security problems would be enhanced by that kind of old system. Whereas, under rules that are being proposed now, which would allow specific prisoners to talk to the press, security problems could be taken care of, and that visits would go on in visiting rooms secured by guards.

Judge Williams: Let me ask you one question:

Justice White in Branzburg v. Hayes said this on Page 684:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

Now, are you disagreeing with that contention or are you saying "I agree with that," and here the press is also seeking what the public is entitled to have?

Ms. Roberts: We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoners.

Judge Williams: But that the press does?

Ms. Roberts: The press has the right to see consenting individuals in the fact that they represent the [92] public generally. The public——

Judge Williams: Just a moment.

Doesn't that mean then special access to information not available to the public in general?

Ms. Roberts: Pardon me?

Judge Williams: Isn't what you are contending mean in effect that the press contends they can have special access to information not available to the public generally?

Ms. Roberts: The press is always in a different position than the public generally. It represents the public.

In the cases of, for example, Estridge and Sheppard, where the press' right to gather information was limited, it was not banned totally, just in the same way that the public does not have the right of hundreds, for example, to go into courtrooms if there are not enough seats. But the press is always treated with an additional right in that there are seats, for example, reserved for the press.

The public is consistently allowed into the prisons throughout California. Whether it's lawyers, relatives,

visitors, clergy people. We feel that though the prison does have the right to limit as to time and place and matter those interviews, it does not have the right to put a total ban on all press interviews.

Judge Williams: Let's get back to the courtroom [93] situation you mentioned.

Is the press there by virtue of a special constitutional right in the courtroom or are they given special accommodations just as a matter of practice?

Ms. Roberts: I think both are true. They're both dealt with as having a special right as representatives of the public. Their right does not come from some other place. It comes from the fact that they are there as representatives of the public and that they will gather, analyze, disseminate that news as essentially officers of the public.

Judge Williams: If there is a big trial and the press arrive and there are no press tables and the courtroom is filled with members of the public, would the press have a special constitutional right to have some of the members of the public ordered out and have them ordered in? You say that there is a right for them to do that?

Ms. Roberts: I think it is difficult to deal with the specifics of throwing out people.

The rights of the press are protected by the fact that the press is given in a sense seniority or special preference in terms of going into the courtroom. For example, members of the press are given the right to deal with emergency situations such as fires or riots. They're allowed behind police lines, for example, in a situation like that. Whereas, the public individually

is perhaps not [94] allowed in those particular places. But the press stands there as a representative of the public and represents the public right to know that situation.

In the Branzburg case, Justice White in speaking for the Court, also said that he was not suggesting that newsgathering did not qualify for First Amendment protections. He said without some protection for seeking out the news, the freedom of the press would be eviscerated. He said that that First Amendment right must be protected.

In the Branzburg case we have a situation where it is exactly the public's right to know that it is being protected. It happens to be in the form of the right of the Grand Jury representing the State and the public to investigate criminal conduct.

The plaintiffs in that case, Branzburg, for example, had written a firsthand account of a narcotic criminal syndicate. It was the Grand Jury that was investigating, was trying to obtain information, was trying to enforce the public's right to know.

We feel that the Court there was in fact protecting that right. The Grand Jury has served a very different function over the years and has served to protect public's right to protection against criminals.

The prison certainly has the right to maintain security, internal discipline, internal administration. But [95] that right must be seen in the light of the interests of the State.

We have to have not merely speculative problems. We have to be shown, in order to abridge a First Amendment right, we have to be shown that security would in fact be impaired.

Mr. Doctoroff will go into greater depths about those specific reasons. But we are not in any instant shown where the prison's right would be the right to both rehabilitate, the right to security, would be infringed upon by controlled interviews.

The New York State Special Commission on Attica, which was selected by Governor Nelson Rockefeller, with the assistance of Chief Justice Stanley Fold of the highest court of New York, came to the conclusion after extensive study that if prisons were to serve any useful function and if a serious attempt was to be made to prepare prisoners for the return to society, they must not be cut off from contacts with the society.

Judge Williams: That's talking about the prisoners' rights.

Ms. Roberts: Yes.

And that prisons must no longer be shrouded from public view close to the communities in which they are located.

[96] The Commission recommended, in fact, there be established a regular procedure to assure the access of the press so that the public can know and that the function of prisons could be served.

Judge Williams: Thank you.

Ms. Roberts: Mr. Doctoroff will—

Judge Williams: Let's have Mr. Murphy respond to this point.

Mr. Murphy: Perhaps to expedite this, possibly Mr. Doctoroff can go ahead, and I can respond to both.

Mr. Doctoroff: Your Honor, in a non-prison setting, there would be no question that the pure speech

rights that prisoners wish to obtain through this action would be granted immediately. What the prisoners are trying to do is merely to have confidential private interviews with their consent with members of the media.

In a prison setting, because of the hands off doctrine that was in effect for many years, courts had been reluctant to enunciate prisoners' rights. But in recent years, particularly First Amendment rights have been recognized by the courts. And unless the prison administrators and the State can show a compelling State interest why those First Amendment speech rights should be limited is there any hope that the State can in fact limit those rights.

Prisoners, like other citizens, have beliefs, they [97] have thoughts, they want to express them, they want to express them in a form where they will be heard. In a prison setting, because of the necessities of prison life in which prisoners are in fact cut off from the public, there are limited channels through which they may speak to the public. They may express their beliefs, they may describe the conditions under which they live, they may describe what they think, what they feel should happen with the prisoners, what they feel should happen with their lives.

In a setting of the California prisons, the State has attempted to justify its interests, its compelling interest by claiming that the pure speech rights which the prisoners wish to express to members of the media will create security problems whereby the prison administrators will lose control of the prison and chaos will result.

The plaintiffs concede that there is a compelling State interest as far as the necessity of maintaining control over California's prisons. But what the defendants have failed to prove or even allege is that there is in fact a causal connection between having media interviews between consenting prisoners and media in any problems that may arise.

There has been no different evidence which has been presented in this case that any problems have actually arisen out of the fact that press interviews ever took place.

[98] Prior to August 21st, 1971——

Judge Williams: Prior to that time, there were no problems with counsel, either.

Mr. Doctoroff: That is true.

That case is currently being litigated in Marin County Superior Court. Various allegations have been made by both sides in that case.

Judge Williams: They don't have to wait until after a catastrophe before they adopt regulations to prevent what might reasonably be anticipated.

Mr. Doctoroff: I agree with that position.

If the evidence which the defendants are able to amass can show there is some causal connection between a problem which happened at San Quentin on August 21 and a visit, if that can be shown in clear terms and if it can be shown that there is only one way of preventing that type of situation, that is, banning press visits, then that would be an adequate showing. The plaintiffs' position is that defendants have not proven that position and our position now is that they never could prove that position.

Prior to August 1971 press visits were with media, the particular type of relief that plaintiffs in this action wished to obtain, that type of access was allowed, visits took place.

In Interrogatories presented to Warden Louis Nelson, [99] who is a defendant in this action, when questioned about problems that may have arisen during the period where press was allowed to interview prisoners at the institution, he answered saying that there were no problems, there were very few, and there were no problems that he could recall.

The type of evidence which defendants have attempted to introduce to try to show that there is a causal connection between the security problems of a prison and press interviews are totally speculative in nature.

One of their theories is that by allowing press interviews, the so-called big wheel prisoner would be created, and by having these so-called big wheels at large within the prison population, it would create a disbalance or an unequilibrium condition among various prisoners, because this big wheel was so reknown he would undercut the control of the institution by the prison administrators.

That specific point was on remand from the Circuit Court of the District of Columbia sent back to the District Court in the case of Washington Post v. Kleindienst. There were additional fact-findings made by that court. All fact-findings made by that court came to the conclusion that this theory that a big wheel would be created by allowing press interviews with particular prisoners was just so speculative in

nature. There was so little proof that it could not be found to be a sufficient compelling reason to undercut the **[100]** rights guaranteed by the First Amendment.

Judge Williams: The Court accepted that in the Seale case, didn't they?

Mr. Doctoroff: The Court did accept it in the Seale case.

Since the Seale case virtually every case addressing itself to this particular problem has discounted that type of analysis.

This Court itself in granting first the permanent injunction and then the temporary restraining order found that logic to be inadequate to undermine the speech rights of prisoners.

In addition to the fact that the big wheel theory does not give any definite relationship between the press interview and the problems that may arise in the prisons, that type of analysis is just totally deficient in that if the big wheel theory were in fact true, then the same type of argument could be made for either allowing letters to the press, where continual correspondence could create this type of big wheel, or allowing random visits, which the Department allowed under the regulations that are being contested.

In addition, since the issuance of the temporary restraining order and the imposition of the interim regulations which plaintiffs are not totally satisfied with but which do **[101]** allow press visits to occur at California prisons, to our knowledge there have been no problems raised by that situation.

If it can be shown that there are specific problems that arise because of specific interviews, then those interviews should be dealt with singularly. But an absolute ban on all press visits with consenting specific prisoners is not a way of solving specific problems that arise from interviews.

Going back again to the idea that creating a big wheel problems in prison administration will arise, the particular incidents of August 21st, where George Jackson and five other people were killed at San Quentin, the Attorney General has continually raised as the issue in this case.

The fact of the matter is that although George Jackson may have had many press visits during his time in prison, this was all related to the fact that he was the author of a book, best-selling book, which gained notoriety, and most of the visits regarding that book regarded the publication of that book, and it wasn't as though people were just merely coming to the prison to see George Jackson. It was related to a particular thing that he had done which related to media and where there was an interest in both parties then.

I mentioned before that in addition to showing a **[102]** compelling State interest, which plaintiffs at this point argue that defendants have totally failed to meet, even if there are shown a logical connection between press visits and problems that may arise in the institution threatening the security of the institution, the Court must also apply the other side of the First Amendment test, which is that in addition to

showing that there is a compelling State interest that's being protected by limiting speech, the State must show that there is no less restrictive alternative method of dealing with that problem.

We merely have to point out that, as I have already said, problems with particular prisoners or particular press people can be dealt with individually. You don't have to journalize and prevent all visits because of the wrong acts of particular people. You don't have to extend a complete ban on speech rights because someone has abused that right in some way. But even in those instances where abuses are shown, those abuses still have to meet the standard that they create some clear and present danger as to threatening a compelling State interest, i.e., a security need of the institution.

If a particular publication causes problems, the Department of Corrections has claimed in its pleading submitted in this case, it will come back to the institution and cause some sort of disruptions by creating chaos just in **[103]** the language of the publication. That allowing interview which would result in that type of publication should be prevented in order to prevent the publication from coming back to the institution.

The simple fact is that the Department of Corrections already does have the power under Penal Code, California Penal Code Section 2600, to prevent inflammatory literature from coming back into the institution. So that even though they allow an interview which in consequence an inflammatory article comes

out, they still have the power to prevent that from coming back in. They have used that for other types of publications and there is no reason why an absolute press ban which prevents the insistency of such a publication is necessary and why merely not just allowing the publication back into the institution is a sufficient way of dealing with that type of problem.

Plaintiffs also concede that in a time of emergency when there is a clear and present danger as to the security of the institution, then maybe an absolute ban may be necessary. At that time, with a proper showing, we concede that it might be satisfactory to exclude members of the press.

What the ban now does is to prevent prisoners who have things to say, who have lots of ideas about prison and the outside, just something to say because they want to say **[104]** it the way any other citizen has the right to do that, why those people should be barred from doing so when there is no real showing that there is any jeopardy at all to the institution.

Plaintiffs at this point feel, I mean, by showing that the prison administrators have failed both to show that there is a compelling State interest that's being protected by barring press people from talking with willing prisoners and failing to show that there are not less restrictive alternative methods of dealing with any problems that may arise from such press visits, we concede that plaintiffs have made an adequate case before this Court.

In addition to these First Amendment tests that have been traditionally applied, there are numerous

other reasons why prisoners should be allowed to have access to the press. So even if the Court applies a lesser span of a reasonableness test, plaintiffs at this point will show that it's clearly unreasonable not to allow prisoners the opportunity to speak with members of the press.

What the prison administration has attempted to do in defending this action in part is to show that the burden is shifted. They have claimed that since the prisoners have other channels of communication, through letters, through random contact, through tours through the prison where press merely interview random prisoners or draw names out of a hat, **[105]** or where special purpose visits are set up, the defendants claim that this is adequate, these three channels are sufficient to protect the prisoners' freedom of speech.

That type of analysis completely eliminates vital parts of face-to-face visits. A face-to-face visit not only allows for a confidential-type of a relationship where certain types of expression won't be stifled by the censuring arm of the prison administrator, but in addition the illiterate prisoner, the prisoner who is inarticulate, the prisoner who is afraid to come out and say anything in a letter, all of these people will have an opportunity to speak to members of the press and have their views expressed to the public.

The standards which the Department wishes to apply allow that to happen only in a completely random basis and through letters which is an inadequate

form of medium for this particular purpose. Letters may be useful for initiating visits and doing background work, but as far as the ultimate task of interviewing and getting one's words out to the public, it is generally much more effective in doing so through a spoken-type of a communication with the members of the press.

Both the Court in Washington Post v. Kleindienst and Burnham v. Oswald in New York have found that these grounds were sufficient to warrant having face-to-face visits in place of just written communication as far as sufficiently **[106]** being able to protect First Amendment rights.

In addition to the prisoners' right to protect their freedom of speech and most effectively utilize it by having face-to-face contact, the press will have an opportunity to weigh the credibility of statements given by prisoners, in the same way that testimony or deposition has been looked upon by courts as being a better method of evaluating the credibility of various persons' testimony.

In addition to the direct effects of press visits, as far as being able to allow the prisoners to express their beliefs and feelings to the public and to talk generally through the medium of the media person, interviews with media people and interviews generally have been seen by people around the country, as enunciated in various cases on similar matters, which have been heard by Federal Courts and also by the very Department of Corrections which is a defendant in this action.

The Holt report which was written in January of 1972, is a report focusing on family visits and chances of success on parole. Although it does not focus on family-type visitation, it emphasizes all types of visitation as being important to the rehabilitative process. And concluding, the Holt report ends by saying that "All possible means should be taken in order to allow expanded-type visits."

Judge Williams: That's certainly a matter of prison **[107]** administration. This Court is not going to pass upon what's good for rehabilitation or not. I think we are concerned about rights and what the basis for any restraints are. To say it is to the interest of the rehabilitative prisoner to have access to the press I think is beyond consideration, as far as I am concerned.

Mr. Doctoroff: I think it is at issue in that the defendants have raised the position several times that the press interviews may interfere with proper——

Judge Williams: On a selected basis. That comes up in the interim regulation controversy.

Mr. Doctoroff: I think it was raised earlier in the case as well.

In any event, I think the fact that there are positive value besides just the pure speech values of allowing press interviews would completely undercut any balancing test that the defendants wish to have applied as the standard in this case.

We disagree with the fact that is the proper standard. But even that type of standard is being used.

By just balancing the reasonability of the press regulations in terms of rehabilitation and security, we feel that it is outweighed by the positive effect of allowing such interviews.

Judge Williams: Any other points, Mr. Doctoroff?

[108] Mr. Doctoroff: I have a few points.

Judge Williams: Please be brief if we want to get to Mr. Murphy.

Mr. Doctoroff: In addition to just directory benefiting rehabilitation, allowing press interviews and outlawing the particular regulation of the Department of Corrections, which prohibits that type of interview, will be to encourage in the prisoners some respect for the law, which in a context where they have been placed in prison for allegedly disobeying certain of America's laws and where prison administrators apparently with impunity have been able to totally violate one of America's most paramount and important laws, the First Amendment, by striking down this type of regulation and telling defendants they are wrong in their action, plaintiffs believe that this will encourage prisoners to have less than the cynical attitude toward courts in the judicial system which they at this time may have.

Thank you.

Judge Williams: Mr. Murphy, will you also try to separate your response in two portions, one as to the rights of the press to access and, two, the free speech rights of the prisoners.

Mr. Murphy: May it please the Court, the defendants' motion to dismiss, of course, must be premised

on accepting [109] the facts as alleged in the complaint as being true. In doing this, as we must, our position is that there is no legitimate issue presented to this Court to resolve, and that our motion to dismiss must be granted.

I think the starting point, which has not really even been alluded to yet in the arguments raised by plaintiffs' attorneys, is the nature of the regulation at issue itself, namely, the August 23rd, 1971 regulation that was imposed upon the institutions of the Department of Corrections by the director.

That regulation provides—and it is very brief and to the point:

> "Press and other media interviews with specific inmates will not be permitted."

I would like to highlight the word "interviews" and also the word "specific."

Now, if a total ban were to have been imposed by the director in his judgment at that time, he would have written a regulation like this: "Press and other media access to all inmates will not be permitted."

That was not the regulation that was composed and promulgated.

It is our view that this is not a broad regulation, but a narrowly-drawn regulation to meet the circumstances which confronted the director of the California Department of [110] Corrections.

This regulation can be looked at from two sides: First, it does not permit particular State inmates to grant individual interviews to the press or other

media representatives. Secondly, it does not permit the press or other media to conduct individual interviews with particular State inmates.

So what the restriction is to is the face-to-face meeting of a representative of the press or the media with an individual inmate of his choosing or the inmate's selecting a member of the press to interview him.

The regulation does not prevent contact with the media through other means. These means, I think, I will set forth in the previous pleading.

The inmate's access to the media through the mail, the media's access to the inmate through the mail, the inmate's access through his family and friends and even through the courts, if necessary, to file some action in the court to bring his grievance to the attention of the public.

All right. The regulation does not prevent access of the media, to the penal system itself, to the administrators and employees of the Department of Corrections, to the facility of the Department of Corrections, and to the random interview of non-specific inmates, if we can use that term, **[111]** by members of the media.

So our position is that this is a narrowly-drawn regulation which complies with any First Amendment objections and that there was a compelling interest for the promulgation of this regulation.

Judge Williams: Mr. Murphy, if the press can interview occupants of the Readjustment Center on a random basis, what additional argument can you

put forth that would make it unnecessarily burdensome to have an interview with a specific occupant of the Readjustment Center?

Mr. Murphy: Yes, Your Honor.

I think there are several contentions that can be advanced or reasons offered to support this regulation.

First, the effect upon the inmate himself, which is the main concern of the Department of Corrections. I think that's probably, if we were to put priority, that's the first concern. The administrative burden is the second concern.

So the first concern is the effect on the inmate. I see this as a two-pronged effect. First, the effect on the rehabilitation of the inmate. Secondly, the effect on the discipline of the inmate.

I think the record shows here already that this particular regulation was required because it was determined in the expert judgment of the director that making celebrities **[112]** of particular inmates was not in the interest of the inmate himself in the rehabilitative process.

An inmate may arrive at the institution a celebrity already by reason of the nature of the crime that he has committed. Or he may have other circumstances in which the inmate becomes a celebrity within the institution by reason of some other collateral matter, let's say a crime he committed or some poem he composes within the institution.

All right. The position of the Department, I think this is a position because it is a position, a policy decision made by an administrator, namely, that pris-

oners are equal, that you will not and should not give special preferential treatment to any individual inmate, whether he considers himself to be a celebrity or not, or whether the media or any other people might consider him such. This is not part of the function of the rehabilitative aspect of our penalogical system.

Judge Williams: Your regulation bars a lot of people who might not qualify as big wheel.

Mr. Murphy: That is correct. I don't know if I like this term "big wheel." I don't know where it originated.

Judge Williams: It is an inflammatory term.

Mr. Murphy: The point is, I think, a better term is a celebrity. As I argued to Your Honor last week that is a situation where the man or the woman becomes a matter of **[113]** public interest as movie stars would become, or other types of celebrities.

Judge Williams: There are 1500 inmates at San Quentin. You have how many celebrities?

Mr. Murphy: Hopefully there would be no celebrities.

Judge Williams: How many do you have now?

Mr. Murphy: I have no idea.

Judge Williams: Certainly not more than five percent?

Mr. Murphy: I don't know who would or would not be the celebrities. Probably it would be very difficult to identify any celebrities because of the impact which this regulation has had in the 14 months in which it was in operation.

Now, that's the first portion of the two-pronged reasons for the promulgation of the role.

The second reason may be a more serious reason. Not to discount the first reason, but it is more serious because the immediate problem which the institutions are facing, namely, the disciplinary problems of those who gain within the ranks of their peers, within the prison, a celebrity-status by reason of the buildup of themselves and their theories by the press media, namely, where competing rivalries are in existence within the prison system itself and where the attention attracted upon a particular inmate will magnify **[114]** that inmate within the prison system itself so that he can seek and attempt to obtain special privileges, is the other factor, namely, the disciplinary factors.

The other one which I just alluded to, would be the administrative burden placed upon the prison in the event that first the media could demand to talk to any individual in the custody of the wardens and superintendents or the other side, if the inmate could demand to talk to the representatives of his choice of the press.

Judge Williams: Couldn't that be resolved by a reasonable regulation rather than by a prohibition?

Mr. Murphy: Yes, it certainly could be resolved by a reasonable regulation. The question is: Is a reasonable regulation other than this one necessary? Does this not accomplish the purpose which the director had in mind when he issued these regulations?

Judge Williams: You admit, do you not, that these regulations do impose additional freedom of speech of the prisoner?

Mr. Murphy: I am not arguing that there is no First Amendment right of a prison inmate. I would not argue that. I cannot argue that.

I can argue——

Judge Williams: I am not arguing that they're not subject to regulations.

[115] Mr. Murphy: As I understand, what we are here for is to what extent can the Department issue regulations that infringe upon the First Amendment right? How far can the Department go? Has the Department gone too far? I assume that is what the plaintiffs are arguing. I think you could probably argue that the Department could go further than they have with this regulation.

Counsel would concede that in an emergency condition like this—I disagree with what they define as an emergency condition— that you could have the outright then which has not even been suggested here.

Have I answered Your Honor's question?

Judge Williams: We are talking about the balancing of interest of First Amendment rights versus the necessity for maintaining integrity of the institution and discipline and so forth. That there is a balance between the two.

I would say that the administrative burden can be that portion, the balancing on that point I think can be done short of the ban here.

Mr. Murphy: Again, let me indicate and let me highlight that I think the important aspect is a personal aspect in connection with the management of the individual inmate, namely, the rehabilitative and

the discipline aspect as distinguished from the administrative burden.

Now, dividing my comments among the lines suggested **[116]** by Your Honor——

Judge Hamlin: Before you go into that, I am not clear just what you mean by specific in this regulation. What do you mean by that? Do you mean persons who are named by the institution or by persons who are named by the press?

Mr. Murphy: Your Honor, I think Judge Williams gave an example, namely, where a reporter comes into the institution and he demands to see inmate Charles Manson. That is a request to see and interview a specifically-named inmate. Under these regulations, that request would be denied.

To contrast that, if a reporter came in, as they have, and requested to interview inmates who had just been released from death row, the prison would afford that reporter, and did in fact and has in fact on several occasions, furnished or made available to reporters inmates who have been on death row for the purposes of interviews.

Judge Williams: Who might not by the lot method?

Mr. Murphy: That is right. There may be some who would consent to the interview and some who would not consent to the interview. But again that is a way of avoiding the problem of having any individual inmate developed as notoriety within the prison or outside the prison as well.

Our position, of course, is that the Branzburg versus [117] Hayes case disposes of the argument of the media's right to special access to specific inmates. We think that the media does not have a right to special access to individual inmates.

On the other issue, namely, as to the inmate's rights, while the inmate does have First Amendment rights, this regulation is not an infringement upon those rights and is a reasonable regulation.

What I would like to do, Your Honor—and I think this would be most helpful to the Court—I brought an expert witness with me today, namely, the Public Information Officer for the Department of Corrections, and he would be able to give testimony and answer Your Honor's questions with reference as to how the Department has in fact operated, what their experiences have been during the period of time from August 3rd, 1971 through November of 1972 when this regulation which is at issue has been in effect.

This would be for the purposes of our opposition to the motion for the preliminary injunction. We understand that this would not be relevant to our motion to dismiss, which must be confined to the corners of the complaint itself.

It is pleases the Court, the witness is available. I can put him on the stand. I would not anticipate the testimony would take any more than 15 minutes.

Judge Williams: It is the consensus of the Court [118] that as long as the testimony is brief and to the point, why, we will allow it. If it gets out of hand,

we would ask that you file an affidavit and that would be the end of it.

Mr. Murphy: Very good, Your Honor.

Phillip David Guthry,

called as a witness on behalf of the defendants, having been sworn, testified as follows:

The Clerk: State your full name and occupation.

The Witness: Phillip David Guthry. I am the Information Officer for the California Department of Corrections.

Direct Examination by Mr. Murphy:

Q. Mr. Guthry, how long have you been with the Department of Corrections?

A. Since 1963.

Q. Where are your headquarters?

A. Sacramento.

Q. Prior to your employment, did you have similar positions elsewhere?

A. I had a similar position, public information position, with the Department of Mental Hygiene. Prior to that, I was in information work with the State Division of [119] Highways.

Q. Can you describe for the Court your duties as the information officer for the California Department of Corrections?

A. I am staffman to the director of corrections. I handle press contacts, press inquiries that come to the Department, which are numerous, and I have a liaison consulting role with our institutions and with our parole officers with respect to matters relating to

press contacts and general community relations activities.

Q. Within the Department of Corrections, are there others besides yourself who are assigned to duties to work with the members of the media?

A. We consider this the ultimate responsibility of the man in charge in each locality or jurisdiction. But at each institution we have a man who is designated as the press contact. In our parole offices we have people who are the local supervisor and who see as part of their responsibility contacts with the press.

Q. Are you familiar with a Department of Corrections rule, 415.071, which was issued on August 23, 1971?

A. Yes, I am.

Q. May we assume that you were representative for the Department during the period that this regulation was in effect?

[120] A. I was press representative in this period.

Q. Now, between the period of August, 1971 and November, 1972, what were the procedures within the Department of Corrections for media access to administrators and employees of the Department?

A. Well, press has virtually unlimited access to employees and administrators. In fact, we go out of our way to try to make ourselves available and to service the media, recognizing the role they play in keeping the public informed.

Q. Now, what methods or means are used to inform the press through the administrators and the employees in the Department?

A. In this period in particular, we were in an arduous period and we had a great many inquiries. I had days of 80 inquiries.

Beyond that, you have press conferences, and hand out press releases, we print brochures, we take newsmen on tours through institutions and permit them to interview staff and inmates and, in general, make a real serious effort to work with the media so they can get the information they want.

Q. What were the proceedures for access to institutional facilities themselves by members of the media?

A. I can give you an example. Say, a newsman was **[121]** interested in doing a particular story in a prison. He might call the prison director or he might contact me.

If he contacted me, I would deal with the institution, explain what the nature of the story he wanted to do, and arrange for him to enter the institution, talk to inmates, staff, see the facilities and, generally try to help him find whatever information he wanted.

Q. In these interviews with administrators, employees and inspections of institutions, what segments of the media were representative?

A. Well, in that particular period, we probably had more coverage than we had had at any time in prior history. I can think of instances in which reporters for various television stations or radio stations or newspapers spend a great deal of time looking at the institutions under the rules that existed.

I can give you three brief examples. For the San Francisco Chronicle we had a request to interview

life inmates on their opinion of capital punishment. They did not request this on a by-name specific individual basis, but asked us merely to put together a group of lifers.

I asked our institutions to select representative men at three different institutions. The reporters for the Chronicle went to those institutions and interviewed the inmates and did a story.

[122] Another example, at the time death row was being phased out of San Quentin, a Channel 3 reporter by the name of Mike Boyd arranged with us to film the activities on the row and to talk to inmates that he ran across in the course of this film all with their consent. In this context, he did in fact have a film interview with Charles Manson.

Judge Williams: What was the date of that death row phaseout interview?

The Witness: I really don't know the date. It was prior to the new rules, because I had some protest afterwards that we had permitted interviews contrary to our rules and I had to explain it was done contrary.

Mr. Murphy: Q. During this period of August '71 to November '72, what has been the access of the media to the inmate population itself?

A. Well, when newsmen would say they want to cover a particular activity like an Alcoholic Anonymous group or a ethnic study group, they're permitted to go into that activity and to sit in while it is going on and to talk to the inmate participants, also talk to staff or, if they're only in some kind of a general tour, to see conditions and they run across inmates in any

area of that prison from the Adjustment Center to Minimum Security inmates in the firehouse, they may talk to them about any subject that they want to. If they so desire, prison personnel will move away so they [123] can talk confidentially.

Q. Do you exercise any censorship or control over what is ultimately written or published as a result of these interviews?

A. None whatsoever.

Q. Now, what procedures, Mr. Guthry, are there for freelance reporters or scholars working on special projects to have access to the institutions?

A. We treat independent authors, freelance authors and students differently than we do working newsmen who are full-time reporters for newspapers, television, news programs and so on.

Essentially, it comes down to an individual evaluation. We would ask the students to describe to us the nature of the projects, the nature of the questionnaire, then evaluate the time that would be involved, assess what benefit there might be to the inmate, and make a decision on an individual basis.

We would function much the same way with an independent author seeking to write a book. And that would be to check with the inmates, see if they're willing, ascertain that the man was actually a writer.

We have had requests from people who always wanted to write a book and thought prison would be a good subject.

Judge Williams: Excuse me.

[124] You would check with the inmates insofar as the freelance writer was concerned?

The Witness: To see, sir, if the inmate were willing.

Judge Williams: You mean a freelance writer could request an interview with a specific inmate?

The Witness: If a freelance writer asked me if he could interview a certain inmate, I would not permit him if it was a specific individual. If he wanted to go into the institution and talk to a group——

Judge Williams: I thought you said you would check with the inmates?

The Witness: Yes, sir.

In every instance we check with the inmate to see if they're willing to be interviewed with newsmen, independent authors——

Judge Williams: If a freelance writer said, "I want to write a story on John Doe," who happens to be in there doing five to fifteen, he is a freelance writer, not a member of the news media, would he be permitted to have an interview with the specific-named prisoner?

The Witness: No, sir.

However, if a freelance writer were trying to arrange to cover something in a prison that involved interviews with non-specific individuals, we would in any case have to **[125]** obtain the inmate's consent and make an evaluation of the project. But we would consider that a different matter than we would a reporter for the Chronicle or the Examiner or the local television station.

Judge Williams: He still couldn't request a specific inmate?

The Witness: Right.

Mr. Murphy: Q. Mr. Guthry, are there any procedures which provide the public generally with access to prison administrators and inmates?

A. We have hundreds of private citizens entering institutions every week for a whole wide range of activities, inmate activities, including Alcoholics Anonymous and so on.

The California Medical Facility, for example, last year there were 6,000 individual citizens who came in just on a tour basis, not counting those who came in for specific activities like therapeutic groups, Alcoholics Anonymous or bridge clubs.

At San Quentin the number who go in either as tours or participants in inmate activities goes about 10,000 a year. So there is really a rather extensive access.

Q. Now, in your opinion, Mr. Guthry, did the promulgation of the regulation in August 1971, namely, Regulation 415.071, in any way hinder public knowledge through the media of prison problems, disorders or grievances?

[126] A. No.

In terms of the nature of prison operations, the conditions in prisons, the issues that the public must consider, none of the knowledge of any of these issues was not, in my opinion, affected.

Q. What then was the function of this regulation during this period of August '71 through November '72?

A. It is my understanding that the authorities who operate prisons were concerned about two issues: The

first was the effects of the notoriety developed from series of interviews—the effect that would have on the inmates. Second was the effect that that notoriety might have on the operation of the institution. Third was the administrative problem, that is, the time and the effort and the problem that is involved in escorting newsmen to see inmates.

Judge Williams: Were some specific requests to interview specific inmates denied during that period of time?

The Witness: Yes, sir.

We tried to hold to the order. We had few protests from the news media, because we did hold to the regulation justly and we did not permit any newsmen to request an interview on a specific by-name basis.

Judge Williams: How can you say then that the public had all the information that was available where an inmate was prohibited from talking to a specific newsman? **[127]** At least to that extent the information was not available, isn't that correct?

The Witness: To the extent that a specific individual was not able to be interviewed by newsmen, yes, sir.

Mr. Murphy: Q. Are instructions given to information officers at the institutions to alert the press of problems?

A. Yes.

When we have trouble particularly, we have procedures which require our institutions to notify the media and to outline the situation.

Mr. Murphy: I have nothing further.

Judge Williams: Please, Mr. Murphy. You have talked about press access to the facility. You haven't interrogated this witness—maybe he has no information—about how many requests by prisoners were presented and how many of those were denied and what problems would he foresee other than the so-called celebrity problem and whether of his own knowledge as a public information officer rather than a correctional officer he could evaluate the effect on the institutional operations.

Mr. Murphy: Q. Mr. Guthry, do you know approximately how many requests were made by inmates during this period of time for interviews with specific representatives of the **[128]** press?

A. You know, that's interesting. I had never really dealt with an instance in which an inmate has asked to be interviewed.

The way this might develop would be through correspondence. The inmate would write a newsman and suggest, "I would like you to come in and interview me," or pass word through a relative. But I have never had to deal with a request coming from an inmate that I somehow set up for him to have a newsman come in and talk.

Judge Williams: Then it wouldn't be any burden, as far as you know, would it?

The Witness: The burden comes from the other end, I feel.

Mr. Murphy: Q. Do you have any other reasons or personal opinions to support the promulgation of this regulation during the period of time it was in effect?

A. Well, it is my feeling that there are particular notorious inmates who would require that the press would interview them. To cite an example, which I think is of some importance, we have one inmate who was interviewed 66 times in a six-month period, prior to the imposition of the rule banning interviews with specific individuals.

We have some others who would, if they would consent, would be interviewed a great many times, many people who are **[129]** sent to prison for notorious crimes.

Each of those imposes quite a burden on us administratively and it is a matter of concern.

As far as the order of the institution is concerned, there is a real problem that I am told about by prison officials which has to deal with the contending groups in the institution who in effect war upon each other and strive for status and, in order to obtain status, is to get coverage in the news media.

So we see this as a device that might set one group against another, which is a very serious problem and can lead to violence, particularly between inmates.

Mr. Murphy: I have nothing further.

Judge Williams: Give me a specific instance.

The Witness: You mean of gang trouble?

Judge Williams: That was fomented or encouraged or increased by interviews.

The Witness: We feel—I think the prison authority feels quite sincerely that the August 21 incident was in part contributed to by the extensive coverage that was given to George Jackson prior to that.

Judge Williams: You mean the escape attempt?

The Witness: Yes, sir. And the killing of the officer and Mr. Jackson himself.

Judge Williams: Have there been any other escape [130] attempts from San Quentin?

The Witness: Yes, sir.

Judge Williams: Other killings?

The Witness: Yes, sir.

Judge Williams: Do you think that the press had any effect on those to stipulate them?

The Witness: I really can't say they did.

Judge Williams: You think this isolated situation was in effect?

The Witness: Yes, sir.

Ms. Roberts: We weren't aware that this witness was going to be called. We would appreciate five minutes to prepare.

Judge Williams: We will declare a ten-minute recess.

(Recess.)

Judge Williams: Are you ready to proceed?

Ms. Roberts: Yes.

Cross-Examination By Ms. Roberts:

Q. Mr. Guthry, can you repeat your official title?

A. Information officer for the Department of Corrections. My official title is Chief of Information and Community Relations.

Q. That's essentially a job that concerns public [131] relations and press relations?

A. Yes, ma'am.

Q. Is the job generally to present the Department of Corrections' point of view to the public?

A. My job is primarily servicing the media.

Q. Is that to present the Department by and large in the best possible light?

A. No.

I would think it is more of making it possible to have newsmen gather information.

Q. Where were you trained for this job?

A. Mainly by experience in prior jobs and going back to journalism training at college and work as a newspaper reporter.

Q. Approximately how many releases were issued during this period of time when the press releases were issued?

A. It depends on what you mean by a press release. If you mean by written hand-out, the Department of Corrections issues very few. If you mean official response to inquiries, thousands.

Q. So you personally and individuals in that field have talked to thousands of press personnel?

A. I have over a period. Thousands maybe. Hundreds might be better.

Q. By and large, when you're talking to press, either **[132]** face-to-face or, say, by the telephone, you are by and large presenting the Department of Corrections' points of view?

A. Yes. That and relating the facts as they exist.

Q. By and large, the information that you get is from administrators and prison officials, such as the warden?

A. By and large.

Q. So in an emergency, for example, you would call up perhaps the warden and try to find out from him what's happened?

A. Right.

Q. In that kind of situation, do you have any access or any wide access to prisoners?

A. I don't usually seek access to prisoners in those kinds of situations. I could arrange it if I had to.

Q. Are you often inside the prisons or are you often in your office in Sacramento?

A. I would say perhaps once a month I am in a prison.

Q. When you are out at the prison, do you generally talk to the administrators or to prisoners out there?

A. Both.

Q. By and large, you would probably be talking——

A. My business contacts would be primarily with administrators. It is hard to walk through a prison without talking to some inmates.

Q. By and large, you would be talking to the warden?

[133] A. The warden and the public information officer.

Q. Do you think you represent prisoners' viewpoints in your statements to the press, whether it is written statements or telephone conversations or face-to-face?

A. Probably not. Although I try to articulate those if I can.

Q. You said you went to journalism school; you did some studying around journalism in preparation for your job. Did that include trying to analyze and study what balance reporting might be and how best to put that forth to the public?

A. I think so, yes.

Q. What would be your experience in that? How would you define, for example, balance reporting?

A. I would consider a reporter who wrote a balance story is one that represented as fairly as he could differing viewpoints.

Q. Why is it less likely that a prisoner would become a celebrity from an interview that's randomly selected as opposed to specifically selected? You said, for example, that in those death row interviews that were permitted, Charles Manson was spoken to.

Would he be less likely to become a celebrity because he is randomly selected?

A. I think the problem is volume. If we had permitted— **[134]** in the period they were permitting newsmen to request interviews with specific individuals and get them, they would be focusing on one or two or three people, who would then be seen by a large number of newsmen and have what amounted to extensive coverage: As in the case of the 66 interviews that I mentioned.

Q. But in the case of an individual interview, perhaps one or two or a small number of interviews, do you think it is more likely that a prisoner would become a celebrity in a randomly selected interview than a specifically selected interview?

A. I don't think it is likely that one interview is likely to turn an inmate into an overnight celebrity.

Q. How about two interviews?

A. I can't really give you a number.

Q. But you would see that a regulation that limited the number of interviews would have a different effect than say a regulation that permitted any number of interviews in terms of creating a celebrity?

A. If there were limitations, yes, there would be a control over that problem.

Judge Williams: Just a moment.

Who gave the 66 interviews?

A. George Jackson.

Ms. Roberts: Q. You consider George Jackson a **[135]** celebrity?

A. At the time of his death, I considered him a celebrity.

Q. Do you know when the press interviews began of George Jackson?

A. At the time he was charged with murder.

Q. Do you know whether he was considered a celebrity within the prison walls before that time?

A. To my knowledge, he was not.

Q. Do you know whether or not there are any other causes for him to become a celebrity, for example, the publication of a book?

A. I considered—I felt—and this is my opinion—that there was a deliberate effort to cause him to become a celebrity in this period.

Q. He did publish a book during this period?

A. Right.

Some of this may have been promotion for the book.

Q. Do you know whether or not he published articles in journals or magazines during this period?

A. I am not familiar with other writings.

Q. Do you know whether or not he was——

Isn't it a fact that he was on trial facing the death penalty?

A. Yes.

[136] Q. You stated before that the incident and the explosion on August 21st was related to the fact of press access.

Can you explain that?

A. It is my feeling that the notoriety that developed in this instance surrounding Mr. Jackson and others that he was affiliated with in that lockup unit through press conferences that were conducted by lawyers through long and extensive coverage in the so-called straight media and the underground press through the publication, the arranging of a publication of a book, that all these created a false sense of status both in the man and false perception and caused them to be problems in terms of the control of the institution.

Q. How did that contribute to August 21st?

A. I think that this was just one factor that led up to what was a terrible tragedy explosion on that date. Had this notoriety not been attained by those people that that would probably have been less likely to have occurred.

Q. Isn't it true that in fact that notoriety resulted in that the incident was very widely covered after

August 21st, but not so much in fact caused the actual incident?

A. I am not saying that it caused it directly, but I say it was one of many factors that contributed to the dynamics that resulted in that tragedy.

[137] Q. You can't be more specific about that?

A. I don't think we are talking about something that you can be that specific on.

Q. You are talking about the First Amendment right of prisoners and the press. So I'm trying to find the causal relationship between an incident like that.

Do you know how many other such violent incidents or, perhaps not as violent, but how many other incidents where prisoners were killed and where correctional officials have been killed? Or seriously injured—that has happened within say, the last two years?

A. You mean where there was a press involvement?

Q. I am asking now whether you know how many other instances there have been where prisoners have been killed or where correctional officers have been killed?

A. I can give you a couple of examples.

In the period of 1970 through today, we had ten correctional employees murdered. Last year, due partly to gang warfare between the two Chicano factions, there were 34 inmate murders in the correctional system of California.

Q. Do you think that either the presence of the press or the absence of the press in any way led to those deaths, both of the guards and of the prisoners?

A. I feel in an indirect way.

Q. Can you be perhaps a little more specific about the [138] indirect way?

A. It is my feeling that coverage of those activities may plant the seed. I know people who are prison administrators have often said this to me.

Q. That's as specific as you can get about the relationship?

A. Yes.

Q. That's all based on not your firsthand experience in terms of the prison situation, but rather on prison officials' thinking that that might be?

A. Right.

Q. How do you select the media that is permitted to go in?

A. Over the years I've——

Q. Let's limit it to perhaps——

Judge Williams: The media, generally.

Ms. Roberts: Now, I am talking about the media, generally, press, newspapermen, women.

Judge Williams: We are not getting into the interim regulations, are we?

Ms. Roberts: Q. I am talking about the period of time after August 21st until the interim regulations have been put into effect.

A. There isn't any hard and fast rule. I never have had any real problem with it.

[139] I considered working newsmen, that is, reporters for television news programs, radio news programs, daily newspapers and newsmen and treated them consistent with policy.

Q. So there weren't any guidelines that you followed?

A. No. Just general practice. We were guided by my experience in mental hygiene and my experience with the Highway Patrol.

Q. Were there any guidelines that you gave to your, I guess, subordinates in this matter, say, officials at different institutions?

A. Yes. I would say if it is a newsman you know to be an employee of a newspaper or a television station, you work with him, if you got some doubts about it, well, consult about it and see if we can establish for sure that's who he is.

Q. In terms of prisoners requesting to see newspeople or groups of prisoners, you mentioned, for example, Alcoholics Anonymous, how was it—how was the decision made in terms of that?

A. I have never really dealt with a request from an inmate group to see newsmen except in time of emergency when we bar media access.

Q. So your field of expertise is not really related to the question of prisoners requesting to see media and press personnel?

[140] A. If a group of inmates were asking to see the press, it would be likely that the institution would inform me.

Q. When a press person or media person goes into a prison, they're allowed to talk to specific prisoners, isn't that right?

A. No.

They're not permitted to request an interview with a specific individual. However, if they are wandering

through one of the housing units and there are inmates in there, they can talk to them about any subject they want to.

Q. Once they're in there, they do talk to specific prisoners?

A. Not on a specific request basis. They talk to people who are prisoners, that's right.

Q. They do go up to a person and say I would like to talk to you, I am so-and-so and they do talk to prisoners?

A. Right.

Q. If they came upon individuals that they knew about, heard about and told about, they could talk to them?

A. They could.

Q. They could talk to those people?

A. Right.

Q. If a prisoner, for example, when a newsperson was on tour, went up to a newsperson and said, "Hey, I want to talk **[141]** to you," that would be permitted?

A. That is right. If a newspaperman wanted to do it.

Q. Are there certain areas in which tours are generally taken and certain prisoners who are not permitted to be around those tours?

A. We are very careful about tours through some of the lockup units. However, newsmen are permitted to enter there and to talk to people. But we try to control the conditions under which those occurred more closely than we would the main line population.

Because that's obviously a more secure area, more risk involved.

Q. Do you think a visit in a visiting room facility which would be under the regular supervision of guards and correctional officials would raise a greater security problem than an individual group of newspeople wandering through on a tour?

A. No.

Q. How do you accept general suggestions for stories?

A. What?

Q. How do you accept suggestions that are made by newspersons for stories? Are some stories acceptable and some not?

A. Very few are unacceptable. Many newsmen call and say, I want to do a story on a certain subject. We try to work with him so he can do that story.

[142] Q. Have many of the stories that have come forth been critical?

A. I would say quite a few.

Q. Have there been stories about brutality?

A. There have been newsmen that have quoted inmates to that effect.

Q. There was recently, as I understand, a strike at San Quentin Prison?

A. Right.

Q. Approximately how many requests for information did you have?

A. In the week of the strike, San Quentin had something over 20 inquiries. They kept a record. I don't have the document with me. Something over 20.

Q. Do you know how those inquiries were dealt with by the local prison officials?

A. The newsmen would ask what's going on, and they would tell them.

Q. So there would be face-to-face interviews by newsmen and prison officials?

A. Or by telephone.

Q. And perhaps a press release?

A. And some appearance on television.

Q. Do you know if prisoners were talked to?

A. No prisoners were permitted to talk during the course [143] of the strike nor was the press permitted to enter the institution.

Q. Do you know whether prisoners have since been permitted to talk to press people about, for example, the issues of that strike?

A. Newsmen have been permitted to go into the institution since then. I don't know that they have talked to the inmates specifically about the strike.

Q. You said that many public citizens were permitted into various institutions under security control. You suggested that something over 6,000 different individuals had been in Vacaville over that period of time.

A. That's in a year.

Q. And something like 10,000 at San Quentin?

A. That is right.

Q. Do you have any idea how many prisoners would have newspeople who would be willing to go see them if permission were granted?

A. Relatively, I would say a small percentage of the total population of 19,500.

Q. So it would be relatively small?

A. Yes.

I don't really see too many newsmen without some idea that there is a news story involved, just responding to an inmate's request to come interview him.

[144] Q. You wouldn't see a flood at the gates of San Quentin?

A. Only in the case of certain very notorious individuals.

Q. You think that certain prisoners would command more news interest but that generally there would not be a flood?

A. Right.

Q. You said also that the bridge club was permitted and people from the outside were permitted to go——

A. People from the outside would play bridge on one night of a week with a group of inmates who were participating in a bridge club.

Q. That means specific prisoners could sign up and go each week or month and meet with people from the outside?

A. Yes, that's right. It is not a situation where the bridge players are coming in to see a specific individual.

Q. But there are specific individuals that go each month?

A. Sure.

Q. Do you know whether or not the public is permitted to see specific prisoners?

A. Members of the family who were permitted to visit with a relative.

Q. Lawyers?

A. Lawyers.

[145] Q. Clergy people?

A. Clergy people.

Q. Any other groups of people that are generally involved?

A. No.

But, of course, on a special purpose basis, we could permit it for virtually any private citizen. That would involve knowing what the purpose of the visit was.

Q. Can you classify persons who are high risks in terms of prison as to the problems with extensive interviewing?

A. I would say those where there is an exceptional amount of news media interest.

Q. So the more news interest the higher the risk?

A. Yes.

Q. It is not related to the prisoner as a prisoner initially and then the news interest is created?

A. Somebody who committed a very highly-covered crime would be a notorious inmate from the moment he arrived and would be the subject of interview requests from the media.

Judge Williams: Would that make him a risk insofar as the administration is concerned?

The Witness: Only in the idea that it would give him a status problem within the institution and would also plunge him into a notoriety role with respect to other inmates.

[146] Judge Williams: How about Dr. Bernard Finch; was he a problem?

The Witness: No, he was not. He was not a problem.

He was a high-news interest case when he first came in, but over the years we had very few contacts about him until the time he was to be released.

Judge Williams: But not a problem as far as the administration and facility was concerned?

The Witness: No, sir.

Judge Williams: How about Carol Chessman?

The Witness: That was before my time. From what I have been told, he was a problem.

Ms. Roberts: Q. How do you deal with individuals that are so-called celebrities prior to the time that they're incarcerated, either because of some outrageous crime or because of some other reason?

A. Well, under this regulation they could not be interviewed on a specific by-name basis.

Q. Are they permitted to see attorneys?

A. Yes.

Q. They're permitted to write articles, for example?

A. They could perhaps send articles out or they could write to a newsman.

Q. Doesn't that contribute to their role as big wheel or celebrity, do you think?

[147] A. Probably to some extent.

Q. But the Department does not stop that kind of publication, for example, from both going out and then coming back in?

A. We have no ban on it.

Q. It does not stop them?

A. Right.

Ms. Roberts: I don't have any further questions.

Mr. Murphy: Just one question.

Redirect Examination By Mr. Murphy:

Q. Mr. Guthry, the strike that you referred to at San Quentin, do you know approximately when this occurred?

A. In the last couple of months.

Q. Was it subsequent to November of '72?

A. I believe it was when the new interim regulation went into effect.

Mr. Murphy: I have nothing further.

Judge Williams: I have one question.

In view of your experience, if a random opportunity to interview prisoners is available, what additional problem other than the so-called celebrity problem, presents itself if there is a selective right to interview? The only difference would be the celebrity problem, is that right?

The Witness: We see that as a major reason for [148] adopting the no specific inmate rule.

Judge Williams: You said that inside the institution at least George Jackson was not a celebrity prior to the time of his incarceration?

The Witness: To my knowledge he was not.

Judge Williams: That is all. Thank you.

Anything else to be presented at this time?

Mr. Murphy: No, Your Honor.

Mr. Doctoroff: I would like to clarify several matters that were discussed in Mr. Murphy's earlier argument.

Judge Williams: All right. A very short response?

Mr. Doctoroff: Yes, it would be.

Your Honor, the entire Court was questioning the greater right that the press has over that of the general public. I think a simple answer to that is found in the language of the First Amendment itself which specifies that the press has a higher right than that of the general public.

There is a freedom of the press. It is not a freedom of the general public to go out and gather news, but it is a freedom of the public to publish and gather news as a necessity component to that type of publication.

Judge Williams: A higher right, you say?

Mr. Doctoroff: A higher right by the very fact that they are in the business of publishing. If a private citizen is in the business of publishing something that is **[149]** generally considered to be media, then that public citizen has transversed from his role as just a private citizen to a person who is in a role as a press person.

Judge Williams: The language of the First Amendment speaks of freedom of the press, freedom of speech, freedom of assembly.

Mr. Doctoroff: I agree.

Judge Williams: You say that the press has a special right?

Mr. Doctoroff: The press has mentioned in the First Amendment itself.

Cases going back to the Zinger-type cases afforded particular rights to people who were publishing.

Judge Williams: It says: "Congress shall make no law abridging the freedom of the speech and of the press." That's applicable to the State by the Fourteenth Amendment.

Mr. Doctoroff: Yes.

Judge Williams: You're saying that gives the press a greater right of access to the media than the public has?

Mr. Doctoroff: I think virtually every State agency in existence has acknowledged that the press does have a special interest in obtaining news above that of the general public.

Judge Williams: Not interest. How about right?

Mr. Doctoroff: I think it recognizes the rights [150] that were enunciated in the First Amendment by providing particular type of treatment. It just acknowledges the existent right.

The fact that San Quentin Prison and other prisons of the Department of Corrections encourages press people to go through their institution on tours and talk to individuals and write stories, I think acknowledges the fact that they at least recognize that the press does have a special role that it plays in American democracy.

They are attempting in a very limited way to encourage that type of activity but, as plaintiffs are contending, that limited random-type visit or special purpose-type visit is inadequate in order to fully protect that right of the press that's being protected by the First Amendment.

In addition, I would like to point out——

Judge Williams: Have you any cases on that point?

Mr. Doctoroff: I don't have them before me now.

Judge Williams: I have looked and looked. The most specific language I have found is the language of Justice White in Branzburg in which he says it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.

Now, I agree that generally they should have information and they're invited into places, but to lock that into **[151]** a special right over and above the right of the public to know, is a step that I don't think any court has yet taken.

Mr. Doctoroff: I think there is other language in Branzburg that does acknowledge that the press has the right to gather news.

Judge Williams: Also they can't have their freedom of speech themselves inpinged upon. I take that to mean that they have a greater right in view of that language than the public generally.

Mr. Doctoroff: I mean, in order that the freedom exercised by prisoners be effectively be able to be expressed to the general public the right of the press to obtain those stories and to sit in on those interviews has to be acknowledged in and of itself since these self-same standards that apply insofar as infringing prisoners' rights should also apply to the rights of the press.

The same compelling State interests that are being raised by the State in trying to strike down the prisoners' freedom of speech are the same standards that have to be applied when the freedom of the press is being limited.

I agree that the press does not have any kind of a right over the general public in most areas. As my co-counsel pointed out, trials are held and the press is given special treatment, because the Courts have come to recognize that the press, in gathering news to disseminate to the general public **[152]** is doing a special service.

Judge Williams: The case that's gone furthest in that direction, if that's the right word, is Washington Post versus Kleindienst.

In his opinion, the judge there stated on Page 3:

> "There are few decisions that have considered whether the First Amendment implicitly guarantees access to news sources under special conditions such as those presented here."

That's a prison case.

> "While the right to publish is firmly established, amendment implications in terms of access are not resolved."

I have looked for other cases as well.

Mr. Doctoroff: I agree with that.

I would go further to say that Branzburg is a very specific instance regarding Grand Jury processes. The Court can find that, by the nature of the fact that other people do go into California prisons, they have access to the prisons, it is not as though there is a complete bar to the public to the prisons, and people have access for the purpose of specific visits with specific prisoners.

An individual can ask to become listed on an individual prisoner's list, visiting list, and go visit him any time he wants. This is an individual member of the public who is able to visit a specific prisoner.

[153] By nature of the press' rights as defined in the First Amendment, I think that they can rise above the mere limitations to visit one prisoner so that they can visit other prisoners.

Judge Williams: I think we have all conceded that the prisoners have First Amendment rights and are subject to reasonable regulations of the rights versus the needs of the State.

Now, if you are contending that the press has a special constitutional right of access, are you also conceding that that right of access can be modified or controlled by administrative regulations that the State can justify?

Mr. Doctoroff: Yes.

Judge Williams: Would you say that the right of access, if there is one, can be modified and qualified by some government agencies?

Mr. Doctoroff: By the standard First Amendment cases which apply to both prison and non-prison situations—recognizing the differences between the objective conditions inside prisons and outside prisons.

The same standard should apply with the recognition that things are different.

Judge Williams: I think that's a whole new field that the Courts have not tred into yet—as far as being able to evaluate when the rights of the press can be modified.

[154] Mr. Doctoroff: I just would like to make one further analogy.

The fact that a person who's speaking to a large audience has the right to speak out does not necessarily deprive any member of that audience the right to come up and speak to him.

This situation is somewhat different, because there are walls and limitations created by the prison situation. But the same freedom of speech, freedom of press interviews, media interviews, who have something to carry out and whose general activity is protected by the First Amendment freedom of press, should raise their interest above that of just a member of the public.

I realize that there is very little authority on this precise area, but I think that the Court could find, I mean just on the basis of the First Amendment and the existent cases, recognizing the right to gathering news, that where there is no compelling State interest whereby the press should not be allowed in, then they should be allowed in.

I realize that the Court has in the earlier temporary restraining order acknowledged that the press has the right to go in as a necessary concomitant of the prisoners' free speech rights, but I think that the media rights should be affirmed also in order to make the opinion completely sound.

[155] So that on the one hand press interviews are allowed not necessarily just because of the prisoners' free speech rights, but also recognizing that they have a right. It is not just a member of the general public that the prisoners are speaking to either, when you gauge the prisoners have the right to freedom of speech. It is not to any member of the general public, it is through this media and I think you have to recognize that that media right is also necessary.

Judge Williams: Okay.

Anything else?

We will take the matter under submission and we will anticipate your points and authorities within ten days.

We will stand adjourned.

[Certificate of Reporter Omitted in Printing] [p. 156]

ATTORNEY GENERAL-OFFICE COPY

United States District Court
Northern District of California
[Filed February 23, 1973]

[Caption Omitted in Printing]

RESPONSE OF DEFENDANTS TO MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Upon permission of the Court, granted February 14, 1973, defendants respond to the amici curiae memorandum filed by the American Civil Liberties Union Foundation.

Argument

Section 415.071 does not violate any rights of the public or of the press

Section 415.071 precludes press and other media face-to-face *interviews* with *specific inmates;* it does not deny press and other media *access* to inmates generally or to specific inmates by means other than interviews. In no way is the press prevented from using its normal sources to gather prison news or is the press prevented from publishing what it wishes concerning prisoners and their conditions.

In *Branzburg v. Hayes,* 408 U.S. 665, 682-683 (1972), the court said:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial interest may be enforced against the press as against others, despite the possible burden that may be imposed."

The Department of Corrections' rule, indeed, does not restrict the right of the press to publish and circulate prison news. *Compare, New York Times Co. v. United States,* 403 U.S. 713 (1971) [injunction against publication of classified material]; *Time, Inc. v. Hill,* 385 U.S. 374 (1967) [damage award on publication of crime story]; *Near v. Minnesota,* 283 U.S. 697 (1931) [statute against publication of defamatory matters]. It is not a form of registration or licensing. *Compare, Organization for Better Austin,* 402 U.S. 415 (1970); *Lamont v. Postmaster General,* 381 U.S. 301 (1965). The First Amendment does not protect press in their mercenary activities and the notion that the press has some higher First Amendment rights than has the public generally has been repeatedly denied. *Red Lion Broadcasting Co. v. Federal Communication Commission,* 395 U.S. 367 (1969); *Associated Press v. United States,* 326 U.S. 1 (1944); *Dieteman v. Time, Inc.,* 449 F.2d 245 (9th Cir. 1971).

This certainly is not a case where the press is being denied access to places open to the public for news gathering; rather, at most, this case involves a limited

and narrow stricture on access to prisons which are closed generally to the public. The press does not have any special claim to access to California's prisons and their inmates. *See Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (3rd Cir. 1958); *United Press v. Valente,* 308 N.Y. 71, 123 N.E.2d 777, 778 (1954).

The promulgation of the instant rule was not done arbitrarily or capriciously; it was not announced at the whim of the Director of the Department of Corrections. The rule is based upon considerations which are real and supported by experience, and is promulgated in good faith. Attached, marked EXHIBIT A, is a copy of the sworn testimony of defendant Procunier given in *Washington Post v. Kleindienst,* Civil Action No. 467-72 (D.D.C.).

The Department, as evidenced by the testimony of Philip Guthrie, provides a comprehensive system under which the press is afforded the opportunity to interview and consult with administrators and employees of the prisons, to inspect prison facilities, to meet with inmates at random so as to learn about and report on conditions or grievances. The press has, of course, access to specific inmates through the mail, through their families and friends, through their attorneys and clergymen.[1]

[1]In the Departments' judgment there is a substantial difference in degree of impact between an individual interview with a particular inmate and the usual exchange of letters between the press and the inmate. The individual interview focuses attention on the inmate within the prison and may result in special privileges for the inmate which is not related to his good behavior and impairs rehabilitation and discipline. Moreover, it presents a serious administrative burden and potential security hazard.

Contrary to amici curiae' claim that rule 415.071 is an "absolute prohibition" by which the "government is closing off its own operations to the press," the Department furnishes a comprehensive system of public information which encourages rather than precludes public knowledge. The rule does not broadly ban access of the press to prisons and prisoners.

In the name of "press freedom," which has no unique standing under the First Amendment, this Court should not substitute its judgment for that of prison officials charged by law with the responsibility for prison management; such officials are permitted reasonable flexibility in rule-making in view of the practical problems they face in the prison environment. *Cruz v. Beto,* 405 U.S. 319, 321 (1972).

Dated: February 23, 1973

Evelle J. Younger,
Attorney General of the State of California

Edward A. Hinz, Jr.,
Chief Assistant Attorney General—Criminal Division

Doris H. Maier,
Assistant Attorney General—Writs Section

Edward P. O'Brien
Assistant Attorney General

/s/ John T. Murphy
John T. Murphy
Deputy Attorney General
Attorneys for Defendants

JTM/EW
CR SF 019920

Exhibit A

In the United States District Court
for the District of Columbia

The Washington Post Co. and Ben H. Bagdikian, Plaintiffs, vs. Richard G. Kleindienst, Acting Attorney General of the United States and Norman A. Carlson, Director United States Bureau of Prisons, Defendants.	Civil Action No. 467-72

Washington, D. C.
March 23, 1972

Ida Z. Watson
Official Reporter
U. S. Court House
Washington, D. C.

Copy for:
Defendants

In the United States District Court
for the District of Columbia

The Washington Post Co. and Ben H. Bagdikian, Plaintiffs, vs. Richard G. Kleindienst, Acting Attorney General of the United States and Norman A. Carlson, Director United States Bureau of Prisons, Defendants.	Civil Action No. 467-72

Washington, D. C.
March 23, 1972

The above-entitled cause came on for hearing on Plaintiffs' Motion for Preliminary Injunction before the Honorable Gerhard A. Gesell, United States District Judge, at 9:40 a.m.

Appearances:

Joseph A. Califano, Jr., Esq.,
Charles Wilson, Esq.,
Richard Cooper, Esq.,
Of: Williams, Connolly & Califano,
Counsel for Plaintiffs

Joseph M. Hannon,
Michael A. Katz,
Assistant United States Attorneys,

Eugene N. Barkin, Esq.,
Julia S. Willson, Esq.,
Department of Justice,
Counsel for Defendants

[2] Contents

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Exhibits

Plaintiffs':		*For Identification*	*In Evidence*
No. 1	Amendment to rules and regulations dated January 4, 1972.	63	67
No. 2	Guidelines for identifying members of the news media.	63	67
No. 3	Amendment to rules and regulations.	63	76
No. 4	Memorandum dated March 22, 1972 from Mr. Walsh to Mr. Malcolm.	76	76
No. 5	D. C. Corrections Department Order 1300.3B, dated January 24, 1972.	93	95
No. 6	D. C. Corrections Department Order 1300.3A, dated April 2, 1971.	93	95
No. 7	D. C. Corrections Department document 1300.3, dated November 2, 1966.	93	95
No. 8	D. C. Corrections Department document 1300.1,dated August 10, 1956.	93	95

[109] have a record closed without it. It is a matter of indifference to me as to who calls him.

Mr. Hannon: Not to me. I will call him. Mr. Califano can rest.

The Court: Mr. Califano is giving you that opportunity.

Mr. Hannon: I take it the Plaintiff has rested?

Mr. Califano: Yes.

The Court: Yes.

Mr. Hannon: May I call, on behalf of the Government, Mr. Procunier, please.

Whereupon—

RAYMOND K. PROCUNIER

was called as a witness by the Defendants, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hannon:

Q. Mr. Procunier, would you tell us your name, please, and spell your last name for the benefit of our Court Reporter?

A. Raymond K. Procunier, P-R-O-C-U-N-I-E-R.

Q. Mr. Procunier, where are you employed, please?

A. I am Director of Corrections for the State of California.

Q. And how long have you been employed in that capacity, sir?

[110] A. Since May of 1967.

Q. Now, would you tell us, if you please, your history insofar as it relates to penal institutions?

A. I started in corrections in April 1948.

Q. If you will slow down a little bit, our Reporter will be able to keep up with you, please.

The Court: She is pretty good; go right ahead.

The Witness: I started as a correctional officer in the California Department of Corrections at the California Institution for men, a minimum security institution in Southern California, in April 1948, as sergeant lieutenant there and training officer for that facility, and transferred to Sacramento in 1956 as an Assistant Departmental Personnel Officer. From there I went to Utah for a year, during 1957-58 as Deputy Director, Personnel Management and Training; and then for six months, the last part of it, I was Director of Corrections in Utah, after they had some difficulty, and during the reorganization and revamping period; followed by return to California as Departmental Training Officer and Associate Superintendent for four years at the California Medical Facility, our psychiatric hospital in Bakersfield. Following that, I was the Superintendent for Inmate Classification in charge of all classification and transfers in the department; then Associate Superintendent of Custody and Superintendent—Associate **[111]** minimum and maximum security institution for young adult prisoners at Tracy; following that, as Superintendent. That brings it up to '67. From then to now, as the Director of Corrections.

Q. Mr. Procunier, would you describe for His Honor what the California penal institutions consist of, please?

A. We have 12 major institutions that handle all of the Superior Court commitments that are sent to state prison. We have a total prison population of women and men, and our civil narcotics addict program in California, where the men are committed and

women are committed under civil commitments for the control of narcotics addiction, a total of about 20,000, approximately 20,000 people in prison, 21 to 22 thousand people on parole.

Q. Twenty thousand in prison in California?

A. Yes.

Q. Approximately?

A. Yes.

Q. For what type of offenses, Mr. Procunier?

A. For the whole range of felonies.

The Court: From petty larceny to murder?

The Witness: Well, we have very few petty larcenies any more. Felonies.

By Mr. Hannon:

Q. What kind of staff do you have?

A. Seven thousand, approximately 7,000 members on the [112] staff.

Q. Who runs each of these institutions?

A. The warden or superintendent.

Q. And how many would that be?

A. Twelve.

Q. Twelve. And you deal closely with them in the operations of the system in California?

A. Yes, you bet.

Q. Now, at one time, did the State of California allow interviews of prisoners by the news media?

A. Yes, we still do, but we had a policy at one time unless there was some obvious reason why not that the individual interviews by name and number were allowed with the accredited press.

Q. So that the newspaperman could make arrangements through your office to interview, face-to-face interview with prisoners?

A. It wasn't necessarily through my office. He could make arrangements with the warden, superintendent or through my office.

Q. Has that practice been discontinued?

A. Yes.

Q. Do you know or did you know an individual named George Jackson?

A. I didn't know him personally.

[113] Q. But you knew of him?

A. Very well.

Q. Was he confined in penal institutions in California?

A. Yes.

Q. Under your jurisdiction?

A. Yes.

Q. He is deceased, is he not?

A. Yes.

Q. Did Mr. George Jackson have anything to do with the judgment of your office to discontinue news media interviews of prisoners?

A. Yes.

Q. Now, would you tell Judge Gesell, please, the criminal history of George Jackson as you recall it?

A. I can't tell you specifically, but it dates back to his early childhood of being involved with the law. He was doing time at the time of the involvement in the incidents that are now very notorious for armed robbery.

Q. And he had a long criminal history, did he not?

A. Yes.

Q. He had been in and out of penal institutions in California?

A. Yes.

Q. At the time of his death, how old was he, do you remember?

[114] A. I don't remember.

Q. Approximately?

A. Twenty-eight, twenty-nine, I don't know. It is just a guess on my part.

Q. Now, when did——

The Court: Are you telling the Court, because of the Jackson incident, you have permanently discontinued any opportunity for interviewing by the press of 20,000 inmates——

The Witness: No.

The Court: —for the future in your system?

The Witness: No. I responded to the question, did his relationship with the press in individual interviews have anything to do with the change of policy. The answer is, yes.

The Court: The change of policy doesn't prohibit interviews?

The Witness: No individual interviews upon request by the media are any longer allowed.

The Court: Specific interviews are no longer allowed? You have prohibited that throughout the system because of the Jackson situation?

The Witness: No, that was one element in the decision. That was my response to the question.

The Court: I am really anxious to know not so much about Jackson as the reasons why you discontinued the practice.

Mr. Hannon: Does Your Honor know Jackson?

[115] The Court: No, he was not a personal friend of mine. I read the papers like everybody else.

Mr. Hannon: I am anxious that you know about him.

By Mr. Hannon:

Q. So would you tell us, Mr. Procunier, about George Jackson, and what his history was in California?

A. George Jackson was a relatively unknown outside the prison but well known inside the institution up until January 1969, when he was charged with the murder of—he, along with two others charged with the murder of a correctional officer at our California training facility at Soledad. Then from then on until August 21, the incident at San Quentin, in which he was killed, he became more and more notorious and as a result in part of our policy for allowing interviews with individual inmates by the press.

Q. What were the circumstances under which George Jackson was killed at San Quentin?

A. By a method—it is in trial now, so we do not know for sure, but a gun was smuggled into San Quentin to him and he attempted to escape and was killed in the escape attempt.

Q. Did he kill anybody in the effort to escape?

A. Yes.

Q. How many?

A. There were three people, three staff members killed and two inmates killed, and three staff members wounded in the [116] circumstances surrounding the escape.

Q. All right. Now, prior to his death, did the press in California have access to George Jackson?

A. Yes.

Q. And what kind of access did they have?

A. Well, it was our policy at the time for accredited news media to hold individual interviews upon requests, and until we stopped that because of the burden of work and the problems we felt it was creating, he had access for a period of about six months there, almost unlimited access.

Q. During the six-month period, can you recall, Mr. Procunier, how many interviews did he have with the press?

A. From August of 1970 until June of 1971, we have recorded—and there may be many more—33 interviews with various media reporters.

Q. And were these interviews that Jackson had with the press over the six-month period published in the newspapers?

A. Yes, many of them.

Q. Then did the penal institutions in California have free access to newspapers?

A. With the exception of on rare occasions that some publications, issue-by-issue, but the answer, generally, is, yes to all what we call legitimate——

The Court: That is because of your policy. You could have stopped the papers from coming in, couldn't you?

[117] The Witness: No.

The Court: You can't stop the newspapers?

The Witness: No, we have a section in our Penal Code, enacted three years ago, that we cannot stop

anything coming in unless issue-by-issue it was determined, it is our determination that it is inciting riot or people to violence. Anything that goes through the mail, we must allow in.

The Court: Oh, yes, but if you felt that Jackson's comments to the press were creating internal difficulties, you could have censored that, couldn't you?

The Witness: It would have been impossible, sir, with the magnitude of the——

The Court: It would not have been administratively possible?

The Witness: Impossible, because the results of the interviews were in most all the publications that were coming in. They come in by the hundreds.

By Mr. Hannon:

Q. Now, what the message, if you will, that George Jackson had that was being published in the press and being sent into your institutions, please?

A. I can't say specifically. Generally, it was our opinion, after reviewing this, that the message was to the dissident type of inmate to not cooperate was the way to bring about change and to cooperate was to perpetuate the system **[118]** as he saw it; and it was destructive, in terms of management principles, a destructive message, in our opinion.

Q. What did the interviews, in your judgment, Mr. Procunier, do to the image of George Jackson? Do you have an opinion on that?

A. It magnified, in our opinion, a negative leadership role, influencing men throughout the department to adopt the same type of attitude.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplin-

ary problems of the penal institutions in California with respect to inmate.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplinary problems of the penal institutions in California with respect to inmates?

A. We felt very strongly that this was the case.

Q. Did you make a judgment, Mr. Procunier, as to what was the cause of the disciplinary problems that were now erupting?

A. Yes.

Q. What was the judgment?

A. The judgment was that the results of interviews with George Jackson and other inmates who had similar attitudes was a part of the increase in problems in the department.

The Court: I don't want to cut Mr. Hannon off, but I am sitting here trying to find out what you did about it. What are your rules now?

The Witness: We have changed it now. The interview policy with the media is almost identical with the Federal requirements. The only change that we made is this: We will **[119]** not allow an interview, a press interview or interview with the the media at their request by specific name and number. We haven't changed the accessibility of the institution and talking to inmates.

The Court: So, it is more or less like the Federal policy?

The Witness: Almost identical to the Federal policy, with a few modifications. We changed from the

open policy to what the Federals are doing now. We have some other changes, but they are minor.

By Mr. Hannon:

Q. The significant change is that the press is no longer allowed to interview prisoners, as such?

A. The significant change is that they still interview inmates. They interview or talk with them, or any way you want to put it, but they do not do it on their own initiative with specific inmates. I can expand on that, if you want me to, to make it clear.

Q. Please do.

A. For example, just recently, because of the interest in California in the death penalty, a reporter from one of the major newspapers in the State wanted to do a story on the death penalty and he wanted to talk to some men who had had the death penalty commuted to life. Prior to that, he would have come in with several names of inmates he wanted to talk to and **[120]** he would have talked to them. Now we had each warden and superintendent give us the names of four, five men who would talk to him; and we gave him the list and said: Who do you want to talk to.

The Court: In other words, you made sure he wasn't talking to a trouble-maker?

The Witness: I am sure they did. I didn't give them those instructions.

The Court: That was the general effort?

The Witness: The general effort is to minimize publicizing the trouble-makers.

The Court: Right.

The Witness: That is the general thrust of the thing.

The Court: Permitting interviews, otherwise?

The Witness: Yes.

The Court: The Federal policy is flat. You understand the Federal policy is no interviews. The Federal policy prohibits interviews without qualification.

The Witness: May I expand on this a little bit?

The Court: Yes, I want your help. You have had so much experience.

The Witness: What I heard them talking about earlier interviews or conversations, we don't distinguish between the two. If an accredited reporter wants to tour San Quentin or Folsom, or some place, and in the process of the tour, as he **[121]** is going around, he can hold conversations or interviews, or whatever he wants, with whatever inmates he wants to. He can't come in and say, I want to see Joe Doakes. We won't let him do that.

The Court: When he has that conversation, chat or interview, is it supervised or can he talk to him without any custodial or other person overhearing?

The Witness: That would depend on the circumstances. This decision would be made on an individual basis. If I were walking through the yard with a newspaperman and he wanted to talk to an inmate, it would depend on the inmate and the circumstances, whether I would step aside or not.

The Court: Right. On the other hand, if he is interested in a subject matter, such as the death penalty, you will permit some interviews there of se-

lected people, not chosen necessarily by him; is that correct?

The Witness: Not specifically. Not chosen by him under any circumstances, but we allow that type of conversation or interview.

The Court: That is unsupervised?

The Witness: Yes, can be or can't be. We make that decision on an individual basis.

The Court: A wholly individual basis?

The Witness: Yes.

The Court: Now I understand. Thank you.

[122] Mr. Hannon, you proceed the way you want.

By Mr. Hannon:

Q. That is comparable, is it not, Mr. Procunier, to the group discussion that we spoke of here today, that we heard about, that occurred at Lewisburg?

A. I don't know what occurred at Lewisburg.

Q. Well, let me change it and ask, essentially, is there any difference between the arrangement that you allow, where you have a group interviewed by the press, and the random selection system which we have at Lewisburg, where we will pick out at random 15 or 20 inmates and allow the member of the press to interview them? Are they essentially the same?

A. It is essentially the same as I heard the warden offered the reporter to do in the segregation area.

The Court: In other words, you don't permit individual interviews under any circumstances?

The Witness: No, we do. I understood that in the segregation area the reporter was allowed to——

The Court: To see a group.

The Witness: ——walk down through, past the cells, and have a conversation with the inmates.

Mr. Hannon: Yes, that is correct.

The Witness: Where we would allow them to interview them in a group.

[123] By Mr. Hannon:

Q. Now, would you allow a member of the news media to come in and talk to Manson, to interview Manson?

A. No.

Q. Or Sirhan Sirhan?

A. No. Not in—no.

Q. Now, did you make any judgment at all, Mr. Procunier, respecting what effect if any the press interview, such as was allowed with George Jackson, had upon the rehabilitative efforts of the institution with respect to that particular inmate?

A. Yes. This was one of the major bases for the decision. There were two or three different factors. One was the disturbance that it causes in other people; and secondly, it is our chore to do two things, we feel; and that is, to house people securely that are sent to us, and secondly, to do everything we can within our power and within our resources to prepare them for return to society.

The first thing that happens, we found out over the years, collectively, that before a man makes any kind of a change, there must be a change in his attitude. If a man is encouraged by increased notoriety and this encourages others to pursue this same thing, their

attitude is such that we can't deal with them in a constructive way. This was one of the major considerations in changing the policy.

Q. Did you conclude that this type of interview did [124] encourage other prisoners to follow the way of George Jackson?

A. Yes, we feel very strongly that that is true.

Q. That impairs the institution's efforts to rehabilitate these people?

A. And to deal with them in a constructive way, yes.

Q. Now, the George Jackson that we are speaking of was one. Were there others that you can call to mind that the press had an interest in interviewing?

A. Yes.

Q. Would you name a couple of them for me, please?

A. There was a man by the name of Drumgo and one by the name of Cluchette.

Q. Who are they?

A. They were the co-defendants in the same murder trial.

Q. The Soledad Brothers?

A. That is what they are euphemistically known as, yes.

Q. Now——

The Court: Your prohibition of interviews affects all of your work release and industrial work programs, and release programs, all of that, all the way through the system?

The Witness: Again, I want to emphasize, on an individual request basis. It doesn't prohibit that if the person were touring. It does on an individual request basis; it prohibits it with everyone.

The Court: No matter what their status is in the [125] correctional system?

The Witness: Right.

Mr. Hannon: May I have Your Honor's indulgence, please, sir.

I have no further questions of Mr. Procunier, Your Honor.

The Court: Are you going to have many? I know this gentleman wants to get away.

When does your plane go?

The Witness: 5:45. I have plenty of time, now that I am on the stand. I don't think they will want to talk to me that long.

The Court: No, they won't. I think at this time we had better break until 1.45. It is a convenient point and I am sure you will get off and get back on schedule with the other judges.

The Witness: I appreciate that, Your Honor.

The Court: 1:45, then. I have one brief arraignment at 1:45 and that is all. Then we will go ahead.

(Whereupon, at 12:30 p.m., the hearing was recessed, pursuant to reconvening at 1:45 p.m. of the same day.)

[126] *Afternoon Session*

(Whereupon, the hearing reconvened at 1:50 p.m.)

The Court: If you will return to the stand.

Whereupon—

RAYMOND K. PROCUNIER

resumed the witness stand and testified further as follows:

The Court: All right, Mr. Califano.

Cross-Examination

By Mr. Califano:

Q. Mr. Procunio—is that it?

A. No.

The Court: No, i-e-r.

By Mr. Califano:

Q. Mr. Procunier, you indicated that prior to the experience with George Jackson, you had a different policy than the one you have now at the prison in California; is that correct?

A. Yes.

Q. How long did you have that policy?

A. It had been in effect for years. I can't tell you exactly the time. It was the whole time I was the Director and prior to that.

Q. So at least from 1957?

The Court: Sixty-seven.

Mr. Califano: Sixty-seven, I am sorry.

[127] By Mr. Califano:

Q. Through some time after August of 1971?

A. Yes.

Q. Do you remember when you changed the policy?

A. The latter part, the last week in August or the first part of September, I think it was.

Q. And Jackson was killed in that month?

A. In August.

Q. Do you by any chance have the two policies, statements of these policies with you?

A. No, I haven't.

Q. Are they written down?

A. Yes.

Q. Was Jackson the most interviewed prisoner you had?

A. No.

Q. There were others who had more interviews over shorter periods of time?

A. No. You asked two questions.

Q. Right.

The Court: You have had some who were interviewed more on a longer period of time?

The Witness: Yes.

By Mr. Califano:

Q. Over a longer period. Jackson, you said, was interviewed 33 times between August of 1970 and June of 1971?

[128] A. Yes, at least.

Q. At least, all right.

You indicated in your direct testimony that that created an administrative burden of some kind.

A. Yes.

Q. What was that burden?

A. Well, we determined conservatively that one administrative burden is that when a man is in a lock-up status, to have him interviewed by the press or anyone else, it takes a half a man day for an interview.

Q. For a half hour interview?

A. Yes, or for an hour interview or for a 15-minute interview.

Q. When you had your interview policy, where were prisoners interviewed?

A. It depended upon the status of the inmate. If he were an inmate in a halfway house, outside the prison, it may be there. It may be on the street while he is on the job; or it may be, in a camp, it would be at the camp office or on the work crew. It would depend on the status of the inmate.

Q. You recognize that 33 interviews over a ten-month period is less than one interview per week. Did you have anyone interviewed more often than that in comparable periods of time?

A. No.

[129] Q. Who would be the next most interviewed prisoner, or what kind?

A. The next most interviewed, related to time, would be an inmate who was interviewed 66 times over a period of about 18 months, something like that.

Q. Did you have a letter policy vis-a-vis communication with the press in California?

A. I don't understand your question.

Q. Are prisoners permitted to write letters to members of the press?

A. Our policy—you are talking about mail policy, is that what you want to get to?

Q. Mail policy, that is correct.

A. Our mail policy in California varies among the institutions from the answer, no, to that question, to, yes, unrestricted. We deliberately do not have the same policy in each institution. We don't want Fol-

som to run like our narcotics hospital. Depending on the kind of inmate that the institution handles, the policy varies.

Q. What is your letter policy, your mail policy at its most liberal vis-a-vis correspondence with the press?

A. Well, it isn't only related to the press. The most liberal institution we have, they send letters on the same basis that you and I do.

Q. Back?

[130] A. They receive them on the same basis that you and I do.

Q. With a prisoner in a prison that would be comparable to a medium security prison in the Federal system, in a prison of that kind in your system in California, what would be the letter writing policy between an inmate and the press?

A. You will have to get specific by name of institution because I leave it up to the warden-superintendent; but, generally, I can answer your question. Going out it would be inspected and may or may not be read; and coming back, it would be inspected and may or may not be read, depending upon the status of the institution. We have no institutions that handle only medium men, the same as the Feds. Within one institution I want the freedom of the wardens so that they can have 100 per cent censorship with some inmates and no censorship with some inmates, depending upon the responsibilities they have demonstrated in their ability to handle mail problems.

Q. Was Jackson permitted to write letters freely?

A. What do you mean, freely?

Q. Was George Jackson permitted to write to reporters?

A. I don't understand what you mean by freely.

Q. Was he permitted to write letters to reporters without censorship?

A. No.

Q. Or to friends without censorship?

A. No.

[131] Q. So his letters were read by the prison authorities before they went out?

A. Yes. With the exception of mail to me or to an elected official in California, the Governor or the agency administrator, and at that time—we have changed it since that time, it has varied—we were allowing sealed letters to attorneys.

Q. Sealed letters to attorneys at that time?

A. Yes.

Q. At that time you had a policy—correct me if I am wrong—where you could have an unsupervised interview with a prisoner if you were a reporter, with no prison official present, in the sense of being present within earshot, but you could not, if you were a prisoner, write a letter that would not be censored or at least read for censorship purposes to a reporter; is that correct?

A. Correct. Under some circumstances.

Q. But in the case of Jackson, as an example?

A. Yes, I am sure that is true.

Q. Do you remember by any chance when Mr. Jackson's book was published?

A. About when it was, I do.

Q. January of 1971?

A. (Witness nods assent.)

Q. Or shortly before then. Do you think that book had **[132]** anything to do with his becoming a Big Wheel in your prison?

A. Yes.

Q. Have you ever read that book?

A. No.

Q. It is a book of his letters.

A. I am aware of what it is. I have had it reviewed to me. I have never read it.

Q. From prison.

In your present interview policy, as I understand, a reporter may walk around the prison with one of your wardens and interview inmates while he is walking around the prison; is that correct?

A. Yes, or with anyone else we designate, if we approve him.

Q. If you approve them. If you approve them, do you let them talk to them without supervision?

A. It depends. I stated, it depends on the circumstances. For clarification purposes, though, it is possible, certainly possible. It would be a—well, that is clear enough.

Q. Do you believe that George Jackson was the major cause—that the publicity which attended George Jackson, while he was a prisoner, is the major cause of the problems you have in the California prison system?

A. The major cause? I don't know that.

The Court: I imagine that crime is the principal **[133]** problem.

The Witness: The people we got in the prison are the principal problem.

Mr. Califano: Just one second.

The Court: What is in the Court's mind a bit here, of course, is a question that may have nothing to do with this hearing because the Court isn't sitting as a legislative body and has no responsibility for drawing regulations. I have tried to follow a lot of the reforms and progress that has been made in California, and I am somewhat aware of the responsibility of that prison system.

What you portray to me is a sort of flexible approach to this problem.

The Witness: Yes.

The Court: Where the individual warden is given judgment, depending on the nature of the problem at the moment, perhaps even the character of the particular newspaperman, the prisoner involved, the circumstances, the whole thing.

The Witness: May I comment here?

The Court: You may in a minute, after I put in focus my question a little more for you.

Here what I am confronted with is an absolute flat policy laid down from the highest authority that writes a total bar across all of the aspects of the Federal system, including work release, every other kind of furlough release, every other **[134]** kind of release.

I am wondering whether in your experience you feel that absolutes of that kind, as opposed to the flexible approach that you have taken in California, is

the best approach to the problem of press relations and corrections generally?

The Witness: I much prefer the flexible approach, however, the one rule that we have with no flexibility is the rule we are discussing about individual requests for interview; and this was put in after a great deal of agonizing because of the very thing you are talking about. The best way for prisons to run, in my opinion, is to allow the warden or the man in charge of each institution, who can better assess than any director or anyone else the conditions of his institution and the kinds of inmates or the condition of the inmate at the time, the type of person that wants to interview him, for what purpose, to make a subjective evaluation of the total thing. However, in order to correct the situation that was getting out of hand, in my opinion, after consulting with the wardens and my staff, time after time, to avoid putting in the very policy we have, because this disturbs me greatly, we had to go to this. Our relationship with the press has always been fine. I would prefer not to have this rule. But I have not been able, with the group of people I have to deal with in California—there are none better, as far as I am concerned, and that is probably biased—to arrive at a solution to control the **[135]** problem that we have been discussing here without that arbitrary rule.

Do you understand what I am getting at? This came after a great deal of agonizing because we tried to have modified versions of it and it wouldn't work.

The Court: I can see from your explanation why you need it in San Quentin, or something of that kind.

The Witness: Yes.

The Court: But do you not have facilities within your system that are minimum security?

The Witness: Yes.

The Court: Perhaps first offenders?

The Witness: Yes.

The Court: Non-violent.

The Witness: Yes.

The Court: That type of prisoner.

The Witness: Yes.

The Court: Why did you feel, because of the Jackson situation, which I understand, that that had to be imposed with respect to this other category of prisoner?

The Witness: My counsel suggested to me that----

The Court: You mean your attorney?

The Witness: Yes.

The Court: I want to be sure you are talking about a lawyer.

[136] The Witness: My attorney suggested to me —we were thinking along the same lines you are suggesting—that I had to make it apply to everyone or I would not be allowed the prerogative that you suggest here. That is the only reason I have it across the board.

The Court: In other words, as a correctional matter putting aside legal considerations, you would tend to want to make the non-interview thing selective also?

The Witness: Yes, sir.

The Court: And it is because of legal considerations that you put it across the board?

The Witness: Yes, sir.

Mr. Califano: You have asked my questions, the last part of it.

The Court: Is there anything further?

Mr. Hannon: I have no further questions to ask.

The Court: Thank you, sir.

Mr. Hannon: May he be excused, Your Honor?

The Court: Yes, certainly.

Mr. Hannon: Thank you very much.

The Witness: Thank you.

(Witness excused.)

Mr. Katz: Mr. Alldredge, please.

[Declaration of Service Omitted in Printing]

[Memorandum of Opinion of United States District Court for Northern District of California in Hillery, et al., v. Procunier, et al., No. C-71-2150 SW, filed August 16, 1973, which is printed as Appendix A of the Jurisdictional Statement filed on November 9, 1973, in Procunier et al. v. Hillery, et al., USSC No. 73-754, and which is now reported at 364 F.Supp. 196, omitted in printing]

Supreme Court of the United States
Order
Filed January 7, 1974
Procunier, et al. v. Hillery, et al.
U.S.S.C. No. 73-754

The motion of the appellees for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted.

Supreme Court of the United States
Order
Filed January 21, 1974
Pell, et al. v. Procunier, et al.
U.S.S.C. No. 73-918

In this case probable jurisdiction is noted. The case is consolidated with No. 73-754 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 73-734

Raymond K. Procunier, Director, California Department of Corrections, et al.,

Appellants,

v.

Booker T. Hillery, Jr., et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-754

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

BOOKER T. HILLERY, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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RESPONSE NOT PRINTED

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On Appeal from the United States District Court for the Northern District of California

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JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Northern District of California, specially constituted pursuant to the provisions of Title 28, United States Code section 2284, entered on August 16, 1973, insofar as it grants the appellees' declaratory relief

and enjoins the enforcement of Section 415.071 of the California Department of Corrections Manual, promulgated on August 23, 1971, by appellant Raymond K. Procunier, Director of the California Department of Corrections. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.[1]

OPINION BELOW

The opinion of the district court filed August 16, 1973, is presently unreported. A copy of the opinion granting declaratory and injunctive relief is attached hereto as Appendix A.

JURISDICTION

This suit was brought by appellees for injunctive and declaratory relief under the authority of Title 42, United States Code section 1983, and Title 28, United States Code sections 1343(3), 1343(4) and 2201. Appellees asked the district court to declare that Section 415.071 of the California Department of

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[1]Appellants are Raymond K. Procunier, Director of the California Department of Corrections; Louis S. Nelson, Warden of the California State Prison at San Quentin; James W. L. Park, Associate Warden of the California State Prison at San Quentin; and Joseph R. O'Brien, Public Information Officer at the California State Prison at San Quentin.

Appellees are Booker T. Hillery, Jr., John Larry Spain, Bobby Bly and Michael Shane Guile, inmates of the California State Prison at San Quentin. The district court dismissed the claims of plaintiffs Eve Pell, Betty Segal and Paul Jacobs and appellants do not challenge that part of the district court's order.

Corrections Manual was in violation of the United States Constitution and to enjoin appellants from enforcing such provision.

The order of the district court was entered on August 16, 1973. Notice of appeal to this Court was filed in the district court on September 12, 1973. A copy of the notice of appeal is attached hereto as Appendix B.

The jurisdiction of the three-judge district court was established pursuant to the provisions of Title 28, United States Code section 2284. The jurisdiction of this Court to review the decision of such a specially constituted district court by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal: *Younger v. Gilmore,* 404 U.S. 15 (1971); *Zemel v. Rusk,* 381 U.S. 1 (1965).

STATE PROVISION INVOLVED

California Department of Corrections Manual Section 415.017:

"Press and other media interviews with specific individual inmates will not be permitted."

QUESTIONS PRESENTED

1. Whether the opinion of the district court is in conflict with the opinion of the United States Court of Appeals for the Ninth Circuit (*Seattle-Tacoma*

Newspaper Guild v. Parker, No. 72-2330, filed June 7, 1973, which is presently unreported, and a copy of which is attached hereto as Appendix C)?

2. Whether the district court properly determined that a prison administrative regulation, which limits but does not prohibit face-to-face access of inmates to the press and other media, can be constitutionally promulgated and sustained only where there is a "compelling interest" advanced by such regulation?

3. Whether the First Amendment entitles inmates to demand and conduct face-to-face interviews with the press and other media?

STATEMENT OF THE CASE

On November 8, 1971, appellee Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that appellants Procunier, Nelson and Park were denying him an interview with the editors of Earth Magazine. An order to show cause was issued by a single-judge district court and on January 13, 1972, appellants filed a return asserting that the complaint did not pray for equitable relief or state facts entitling appellee to such relief, did not allege exhaustion of administrative remedies and did not show a violation of a federal right, a prospect of irreparable harm or a likelihood of appellee prevailing on the merits. Upon hearing on the order to show cause, counsel was appointed for appellee Hillery and, on March 8, 1972, a first

amended complaint for damages and declaratory and injunctive relief was filed.

The amended complaint added as plaintiffs the appellees John Larry Spain, Bobby Bly and Michael Shane Guile and also Eve Pell, Betty Segal and Paul Jacobs and added as a defendant the appellant Joseph O'Brien. The new pleading alleged the original claim of appellee Hillery and further alleged that Eve Pell was a freelance author who had been denied a requested interview with appellee Spain, that Betty Segal was a newspaper reporter whose request to interview appellee Bly was disapproved and that Paul Jacobs was a television reporter who had unsuccessfully sought permission to interview appellee Guile. The complaint "sought to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel." The amended complaint made no specific reference to Section 415.071 of the California Department of Corrections Manual.

On April 6, 1972, appellants moved to dismiss the amended complaint and subsequently, both sides filed further points and authorities in support of their respective positions during the course of which Section 451.071 was brought to the court's attention. On September 29, 1972, the single-judge district court issued an opinion and order declaring Section 415.071 invalid as a violation of the First Amendment, permanently enjoined the enforcement thereof and directed appellants to submit a proposed new rule con-

sistent with the opinion. Appellants, on October 4, 1972, filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and appellees did not oppose the motion. Consequently, on November 1, 1972, the September 29 opinion and order were set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.[2]

The matter was heard before the three-judge district court on February 24, 1973. After the filing of additional memoranda by the American Civil Liberties Union, amicus curiae, and by appellants, the matter was submitted.

The opinion of August 16, 1973 (Appendix A, attached) sets forth the facts about which there is no significant dispute. The district court found that prior to the late 1960's interviews between prisoners and the press were relatively infrequent and resulted in little burden upon or danger to the institution. However, the number of requests for such interviews increased substantially, with the rise of discontent within the prisons and with the consequent arousal of public concern and curiosity. This generated administrative hardships and also produced "the phenomenon of the 'prison celebrity' or 'big wheel'—the prisoner who through his writings and media coverage gained a certain notoriety both outside and in-

[2]Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were approved by the single-judge court on February 8, 1973.

side the institution." The court further noted that the "influence of the 'celebrity' over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison."

The district court then discussed the events which triggered the publication of Section 415.071, namely, the "tragic events of August 21, 1971," during which three San Quentin staff members and two inmates were killed. The court found that these events were viewed by officials as the climax of mounting disciplinary problems partially caused by the prison's "liberal posture" or "laissez-faire policy" with respect to press interviews. Section 415.071 was implemented on August 23, 1971.

The opinion further recognized the fact that the Department's regulation did not in practice prohibit all interviews, but allowed media representatives to enter the prison and conduct random interviews in which inmates so selected could express themselves personally.

Section 415.071, the court found, did not violate any First Amendment rights of the press and, accordingly, the claims of plaintiffs Pell, Segal and Jacobs were dismissed.

At the same time, however, the district court concluded that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. While observing that written communications with the press were not restricted, the court reasoned that inmates may demand

face-to-face interviews as a constitutional right because prison authorities should have no objection to having inmates who are inarticulate, and with apparently uncorroborated stories, assisted by the press.

In striking contrast with the facts as set forth at the outset of the opinion, the district court found that there was no "compelling interest" for the regulation. Addressing itself to San Quentin Prison only, the court found that appellants had made an insufficient showing of administrative burden caused by inmate initiated interviews, had not established the validity of the "big wheel" phenomenon and had not proven any rehabilitative effect from Section 415.071.

The court found Section 415.071 "too drastic" a measure but observed that reasonable limitations as to time, place and manner of such interviews may be imposed and that if authorities have good cause to believe that a particular interview would pose a clear and present danger to prison security, it may be denied.

THE QUESTIONS ARE SUBSTANTIAL

The opinion of the district court expands the application of the First Amendment to a novel set of circumstances. State prisoners, lawfully confined, may now demand that their responsibile custodians permit them to engage directly in meetings with the press and other media and such face-to-face interviews cannot be prohibited unless the responsible custodians prove a "compelling interest" for doing so. Though alternative means of communication are available, the district court holds that California cannot deny spe-

cific, individual interviews of its inmates with the press when initiated by the inmates. The questions presented by this decision are of utmost importance to the continued administration of the California prison system and those of other states, and the rationale of the district court may be felt in other areas of prison management as well.

Appellants urge that this Court take jurisdiction of appellants' appeal, review the decision of the district court and resolve the important issues at stake.

ARGUMENT

I

THE NINTH CIRCUIT HAS RULED DIRECTLY CONTRARY TO THE DISTRICT COURT ON THE SAME ISSUE.

Seattle-Tacoma Newspaper Guild v. Parker, United States Court of Appeals for the Ninth Circuit, No. 72-2330, June 7, 1973 (Appendix C, attached), was a suit brought by the press to establish an alleged right, among others, to individual interviews with inmates in a federal prison. Certain inmates joined in this litigation claiming that the Bureau of Prisons' policy statement involved, which prohibited *all* individual interviews, violated their First Amendment rights.

The similarities between the *Seattle-Tacoma* case and the instant case are more than striking. The Bureau of Prisons' policy statement and the California Department of Corrections' regulation were generated by serious prison disorders in 1971 and both

resolutions represented the abandonment of practices giving inmates relatively unfettered access to the press.

According to the *Seattle-Tacoma* opinion, the affidavit of the Director of the Bureau of Prisons disclosed a management determination that disciplinary problems increased following interviews with the disruptive and non-cooperative prisoners who encouraged others to adopt their hostile approach, and the prisoners interviewed became celebrities or "big wheels" who were less subject to constructive rehabilitation. The affidavit of the Director of the California Department of Corrections, appellant Procunier, in the instant case, stressed the "very real need to prevent such inmates from gaining notoriety via news media because of their behavior" and urged the point that it was detrimental to the general operation of the institution and to the welfare of the individual himself to allow him to become a hero or public figure with his peers or the general public "by unusual attention from the news media." In another document,[3] appellant Procunier speaks of an inmate named George Jackson, one of those killed on August 21, 1971:

> "By Mr. Hannon [Assistant United States Attorney]:
>
> Q. So would you tell us, Mr. Procunier, about George Jackson, and what his history was in California?
>
> A. George Jackson was a relatively unknown outside the prison but well known inside the in-

[3]Appellants filed in the district court the transcript of Mr. Procunier's testimony in *The Washington Post Co. v. Kleindienst*, United States District Court for the District of Columbia, Civil Action No. 467-72.

stitution up until January 1969, when he was charged with the murder of—he, along with two others charged with the murder of a correctional officer at our California training facility at Soledad. Then from then on until August 21, the incident at San Quentin, in which he was killed, he became more and more notorious and as a result in part of our policy for allowing interviews with individual inmates by the press.

Q. What were the circumstances under which George Jackson was killed at San Quentin?

A. By a method—it is in trial now, so we do not know for sure, but a gun was smuggled into San Quentin to him and he attempted to escape and was killed in the escape attempt.

Q. Did he kill anybody in the effort to escape?

A. Yes.

Q. How many?

A. There were three people, three staff members killed and two inmates killed, and three staff members wounded in the circumstances surrounding the escape.

Q. All right. Now, prior to his death, did the press in California have access to George Jackson?

A. Yes.

Q. And what kind of access did they have?

A. Well, it was our policy at the time for accredited news media to hold individual interviews upon requests, and until we stopped that because of the burden of work and the problems we felt it was creating, he had access for a period of about six months there, almost unlimited access.

Q. During the six-month period, can you recall, Mr. Procunier, how many interviews did he have with the press?

A. From August of 1970 until June of 1971, we have recorded—and there may be many more —33 interviews with various media reporters.

Q. And were these interviews that Jackson had with the press over the six-month period published in the newspapers?

A. Yes, many of them.

Q. Then did the penal institutions in California have free access to newspapers?

A. With the exception of on rare occasions that some publications, issue-by-issue, but the answer, generally, is, yes to all what we call legitimate—

The Court: That is because of your policy. You could have stopped the papers from coming in, couldn't you?

The Witness: No.

The Court: You can't stop the newspapers?

The Witness: No, we have a section in our Penal Code, enacted three years ago, that we cannot stop anything coming in unless issue-by-issue it was determined, it is our determination that it is inciting riot or people to violence. Anything that goes through the mail, we must allow in.

The Court: Oh, yes, but if you felt that Jackson's comments to the press were creating internal difficulties, you could have censored that, couldn't you?

The Witness: It would have been impossible, sir, with the magnitude of the—

The Court: It would not have been administratively possible?

The Witness: Impossible, because the results of the interviews were in most all the publications that were coming in. They come in by the hundreds.

By Mr. Hannon:

Q. Now, what was the message, if you will, that George Jackson had that was being published in the press and being sent into your institutions, please?

A. I can't say specifically. Generally, it was our opinion, after reviewing this, that the message was to the dissident type of inmate to not cooperate was the way to bring about change and to cooperate was to perpetuate the system as he saw it; and it was destructive, in terms of management principles, a destructive message, in our opinion.

Q. What did the interviews, in your judgment, Mr. Procunier, do to the image of George Jackson? Do you have an opinion on that?

A. It magnified, in our opinion, a negative leadership role, influencing men throughout the department to adopt the same type of attitude.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplinary problems of the penal institutions in California with respect to inmates?

A. We felt very strongly that this was the case.

Q. Did you make a judgment, Mr. Procunier, as to what was the cause of the disciplinary problems that were now erupting?

A. Yes.

Q. What was the judgment?

A. The judgment was that the results of interviews with George Jackson and other inmates who had similar attitudes was a part of the increase in problems in the department."

The Ninth Circuit in *Seattle-Tacoma* recognized and emphasized that the Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison, the safety and rehabilitation of the inmates and must be given "wide discretion in formulating rules to govern prison life." The court concluded that the federal ban on interviews was a necessary and reasonable action within the scope of discretion given prison administrators and did not violate the prisoners' First Amendment rights. The same would seem to apply to the managers of a state prison as well.

After Mr. Procunier in his transcribed testimony explained the basis for his decision restricting press interviews with specific inmates, he elaborated on the practice under the new regulation, section 415.071:

> "The Court: I don't want to cut Mr. Hannon off, but I am sitting here trying to find out what you did about it. What are your rules now?
>
> The Witness: We have changed it now. The interview policy with the media is almost identical with the Federal requirements. The only change that we made is this: We will not allow an interview, a press interview or interview with the media at their request by specific name and number. We haven't changed the accessibility of the institution and talking to inmates.
>
> The Court: So, it is more or less like the Federal policy?
>
> The Witness: Almost identical to the Federal policy, with a few modifications. We changed from the open policy to what the Federals are doing now. We have some other changes, but they are minor.

By Mr. Hannon:

Q. The significant change is that the press is no longer allowed to interview prisoners, as such?

A. The significant change is that they still interview inmates. They interview or talk with them, or any way you want to put it, but they do not do it on their own initiative with specific inmates. I can expand on that, if you want me to, to make it clear."

The California regulation is certainly less restrictive than the federal policy. Consequently, the district court in the instant case should have followed the path of the Ninth Circuit. *See also Sostre v. McGinnis,* 442 F.2d 178, 179-200 (2d Cir. 1971) (en banc). The fact that it has set upon a different course has caused conflicting court opinions in the same jurisdiction and has produced different legal guidelines for state and federal penal institutions.

II

THE DISTRICT COURT APPLIED AN IMPROPER STANDARD IN DETERMINING THE VALIDITY OF THE PRISON REGULATION.

Restrictions on the extent and character of inmates' communication with the outside world are inherent incidents in the management of prisons and prisoners. Federal courts have formulated a variety of "standards" in determining whether or not a prison rule violates the First Amendment.

A few courts, such as the district court in the instant case, have demanded prison officials to demon-

strate a "compelling interest" for the rules they promulgate. *See Nelson v. Heyne*, 355 F. Supp. 451, 452-455 (N.D.Ind. 1973). Most courts, however, hold that the authorities must show that the regulation or practice is "reasonably and necessarily" related to the advancement of some justifiable purpose of imprisonment. *See Gray v. Creamer*, 465 F.2d 179, 186 (3rd Cir. 1972); *Corothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970). The United States Court of Appeals for the Ninth Circuit has adopted a "rational basis" test which, in effect, is a corollary of the "reasonable and necessary" standard followed by the majority of courts. *Seattle-Tacoma Newspaper Guild v. Parker*, No. 72-2330, June 7, 1973 (Appendix C, attached).

Lawful incarceration brings about the withdrawal of access to many means of communication, *e.g.*, the use of telephones and the unlimited access to visitors. Such personal or physical methods of relating the message to the media, in a prison setting, are not fundamental to the First Amendment. The "compelling interest" standard is too strict a test. While appellants do not concede that the reasons for implementing Section 415.071 fail even this standard, nevertheless it was not the proper guideline for the district court to follow.

III

APPELLANTS IN PROHIBITING INMATES FROM DEMANDING AND CONDUCTING PERSONAL AND INDIVIDUAL INTERVIEWS WITH THE PRESS DO NOT "ABRIDGE" THE FREE SPEECH OR OTHER FIRST AMENDMENT RIGHTS OF THOSE INMATES.

Inmates, of course, retain federal constitutional privileges and rights, but it is axiomatic that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). This undisputed principle is consistently applied by federal courts to uphold restrictions upon the communicative activities of prisoners which, if they were free men, would enjoy constitutional protection. *Stroud v. Swope*, 187 F.2d 850, 852 (9th Cir. 1961), *cert. denied*, 342 U.S. 829 (outside publishing business); *Numer v. Miller*, 165 F.2d 986, 987 (9th Cir. 1958) (correspondence courses); *Lee v. Tahash*, 352 F.2d 970, 973-974 (8th Cir. 1965) (prisoners' mail); *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964) (prisoners' mail); *Vida v. Cage*, 385 F.2d 408, 409 (6th Cir. 1967) (communications with other prisoners); *McDonough v. Director of Patuxent*, 429 F.2d 1189, 1192-1193 (4th Cir. 1970) (correspondence with magazine); *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (en banc), *cert. denied*, 405 U.S. 978 (prisoners' mail).

Federal courts have uniformly recognized that an inmate's communications with the outside world may be restricted for rational penal objectives, and that

the inmate's free speech and other First Amendment rights are not violated by such prison regulations. As stated by the Second Circuit, *en banc*, in *Sostre v. McGinnis, supra*, 442 F.2d at 200: "Discipline and prison order are sufficient interests to justify such regulation incidental to the prisoners' speech." *See also, McDonough v. Director of Patuxent, supra*, 429 F.2d 1189, 1193 (4th Cir. 1967) (upholding prohibition of inmate's correspondence with national magazine and others to prevent adverse effect on "institutional control and discipline").

The decision of appellants to bar inmates from granting individual interviews to the press is based upon their determination that such a rule is necessary to maintain the discipline, custody and control of California prisons, and such restriction on individual interviews constitutes an appropriate exercise of their broad regulatory powers. As the Ninth Circuit declared in *Smith v. Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969):

> "It is . . . settled . . . that correctional authorities have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's consitutional rights."

The California Department of Corrections permits the written communication of inmate grievances, complaints and stories to the press and this system continues to give inmates reasonable access to the press. It also permits special purpose visits with publishers.

The restriction of one particular means of communication, namely, individual face-to-face interviews with news representatives, does not abridge the freedom of speech or other First Amendment rights of inmates. *Seale v. Manson*, 326 F.Supp. 1375, 1379 (D.Conn. 1971). In *Smith v. Bounds*, Civ. No. 2914 (E.D.No.Car., opinion dated March 14, 1972), the district court sustained a state prison rule barring inmate interviews with the press, noting (opinion pp. 4-5):

> "In light of the mail regulations of the North Carolina Department of Corrections, it appears that inmates have been provided with sufficient opportunity to correspond with the members of the media and to present their views to the public. In the light of such opportunity, it is not necessary that personal interviews must also be permitted."

Communications between prisoners and the press are not barred by Section 415.071; it prohibits only direct individual press interviews with particular inmates. In view of the need to maintain prison discipline and order, this narrow restriction is not a constitutionally prohibited abridgement of First Amendment rights. See *Cox v. Louisiana*, 379 U.S. 559, 566 (1965), where this Court sustained a state's total ban on picketing near a courthouse when that ban expressed a legislative judgment—comparable to the judgment of prison officials in the instant case—"that such conduct inherently threatens the judicial process." See also *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).

In *Breard v. Alexandria*, 341 U.S. 622, 644 (1951), this Court held that free speech and free press were not "abridged" by an ordinance barring door to door soliciting notwithstanding a publisher's claim of a "right to distribute publications in the precise way that those soliciting for him think brings the best result." Cf. *Johnson v. Avery*, 393 U.S. 483 (1969) (recognizing that an appropriate system of alternative assistance to inmates would justify prison rules barring inmates from acting as writ-writers). *See also Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972), where this Court upheld a ban against distribution of handbills in the interior mall area of a large privately owned shopping center, noting that, "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."

Because California does not allow inmates to demand that prison authorities give them face-to-face meetings with the press and to conduct such press conferences, the inmates are not deprived of a federal constitutional right.

CONCLUSION

For the reasons stated above, substantial questions under the Constitution are presented in this case. Jurisdiction should be noted.

Dated, November 7, 1973.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States District Court
For the Northern District of California

No. C-71-2150 SW

Booker T. Hillery, Jr., et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed August 16, 1973]

MEMORANDUM OF OPINION

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS District Judges:

WILLIAMS, District Judge:

At issue here is the constitutionality of §415.071 of the California Department of Corrections Manual, which provides:

> "Press and other media interviews with specific individual inmates will not be permitted."

I.

Plaintiffs seek injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdic-

tion is conferred upon this court under Title 28 U.S.C. §§1343(3), 1343(4) and 2201.

II.

Plaintiffs Hillery, Spain, Bly and Guile are prisoners at San Quentin State Penitentiary. Editors of *Earth Magazine* wish to interview Hillery. Plaintiffs Pell, Sebal, and Jacobs are, respectively, free lance, newspaper, and television journalists, each of whom wishes to interview one of the three other inmate plaintiffs. Each of the inmate plaintiffs has affirmatively consented to an interview; each request was denied by the Warden on the basis of §415.071. None of the prisoner plaintiffs has been alleged by the defendants to have presented disciplinary problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks.

Defendant Procunier is the Director of the State Department of Corrections. Defendant Nelson is the Warden of San Quentin; defendants Park and O'Brien are Associate Wardens.

III.

This case has its humble origins in a complaint drafted by a lay prisoner serving time at San Quentin. Shortly after the action was filed the court appointed counsel and the complaint was amended in March 1972 to add several other prisoners and media representatives as plaintiffs. The State filed a motion to dismiss for failure to state a claim upon which relief can be granted. The matter was thoroughly

briefed and the court, on September 29, 1972, preliminarily enjoined the enforcement of §415.071 and ordered defendants to submit proposed revisions to the regulations comporting to the standards set forth in the court's memorandum of decision. The State immediately moved for vacation of the order for lack of jurisdiction, arguing, for the first time since the initiation of the lawsuit, that since the regulation in question was applied by the Department of Corrections uniformly throughout the entire state penal system, the matter must be adjudicated by a three-judge court. Title 28 U.S.C. §2281; *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969).[1]

Plaintiffs conceded that given the scope of application of §415.071 the injunction was invalid. They urged the court to grant a temporary restraining order pending a final disposition by the three-judge panel. Upon affidavits submitted on behalf of the plaintiffs the court found that plaintiffs would suffer irreparable harm if the relief were not granted and issued the temporary restraining order under the

[1]The litigation had proceeded for almost a year with the parties' and the court's attention focused on the interview practice at San Quentin, where all of the inmate plaintiffs are detained, the interviews sought by the media plaintiffs were to take place, and all the defendants, save Mr. Procunier, were employed. The State, in its moving papers, explained that it did not feel obliged to bring to the attention of the court the statewide nature of the regulation or the jurisdictional point beforehand because it was of the opinion that the issue presented in the lawsuit was insubstantial—a somewhat curious appraisal given the court's obvious concern over the constitutional questions presented by the complaint, manifested, in part, by appointment of counsel for plaintiffs.

same terms as provided in the original injunction. Title 28 U.S.C. §2284(3).

Interim regulations were formulated by the prison officials and implemented in November 1973. None of the sought-after interviews took place, however, and plaintiffs subsequently moved the court to hold defendants in contempt for failure to comply with the order. Defendants moved the order be dissolved. Both motions were denied in light of the impending hearing by this court.

The panel convened February 22 to determine the constitutionality of §415.071 as originally worded. The instant ruling is based on the arguments and testimony offered on that date and the memoranda of law and affidavits submitted by the parties.

IV.

Prior to the implementation of §415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960s such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon

of the "prison celebrity" or "big wheel"—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the "celebrity" over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison.

It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 §415.071 was adopted to mitigate the problem.

The regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population.[2] Thus, media representatives are able to interview an inmate, but unable to select a particular inmate. Similarly, a prisoner who happens to be randomly selected can express himself personally to the newsman or journalist, but cannot initiate an interview himself.[3]

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[2]It is not clear whether selection is made from all segments of the population or whether it is limited to those sections where visitors otherwise have access.

[3]Prisoners engaged in writing for publications are authorized to meet with their publishers' representatives under a separate regulation covering *business* activities of prisoners.

V.

The media plaintiffs herein and amicus curiae[4] argue that §415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees. It has been made clear in recent decisions by the Supreme Court that the press enjoys no greater right to access to news sources than the average citizen. In *Branzburg v. Hayes,* 408 U.S. 665 (1971) the Court held that newsmen were not immune to grand jury solicitation of or information derived from the newsman's confidential sources. While the facts of that case are substantially different than those presented here, the Court unequivocally dismissed any notion that the First Amendment bestowed upon newsmen special news-gathering privileges. Reviewing past decisions on the subject[5] the Court observed:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684.

As in *Branzburg,* the present case ". . . involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." 408 U.S. at 681.

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[4]American Civil Liberties Union.

[5]*Inter alia, Zemel v. Rusk,* 381 U.S. 1 (1965); *Shephard v. Maxwell,* 384 U.S. 333 (1966).

This rationale was followed by the Ninth Circuit in the recent decision in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker,* Civ. No. 72-2330 (June 7, 1973). In that case media plaintiffs and prisoner intervenors challenged a regulation implemented at McNeil Island Federal Penitentiary which prohibited press interviews with willing prisoners. With respect to the First Amendment claims of the media representatives, the court held that under *Zemel v. Rusk, supra,* the "'. . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information'" (Slip opinion at 7), and that the "disruptive influences" at McNeil "outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews." Slip opinion at 7.

The *Seattle-Tacoma* ruling with respect to the media claims controls here. We note in passing, however, that cases cited by plaintiffs emanating from other jurisdictions apparently arriving at an opposite conclusion are distinguishable. In *Washington Post v. Kleindienst,* Civ. 467-72 (D.D.C. April 9, 1972), 40 U.S.L.W. 2683[6] for example, the regulation held un-

[6]In its first Washington Post rulings (hereinafter "Washington Post I") the district court enjoined defendants' enforcement of a regulation banning personal interviews between press representatives and inmates. Defendants secured a stay of that ruling by the Supreme Court *Kleindienst v. Washington Post Co.,* 406 U.S. 912 (1972) and appealed the decision to the court of appeals. That court remanded the case to the district court for reconsideration in light of *Branzburg v. Hayes, supra,* and for further evidentiary proceedings to examine, among other issues, the necessity of personal interviews and the legitimacy of the "big wheel" theory. *Washington Post v. Kleindienst,* Civ. No. 72-1362 (D.C. Cir., September 6, 1972). The district court held further

constitutional barred *all* interviews with inmates at federal penitentiaries in Connecticut and Pennsylvania. The court held that "[a] continuing flat ban against press interviews of any prisoner, at any time, in any institution, is on its face arbitrary." *Washington Post I* at p. 5. In that context, it is apparent the press was not being granted a *special* right of access to prisoners, but simply *some* access. Even under §415.071 as it stood before today's ruling the press was given the freedom to enter the California institutions and interview at random, and it is the conclusion of this court that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates.

VI.

We turn next to the prisoners' rights as they are affected by §415.071. Case law dealing with the constitutionality of prison regulations has proliferated in recent years. From those decisions the court discerns three axioms within whose bounds the current analysis must take place. 1) It is clear that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal

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hearings and issued a Supplemental Memorandum, confirming its earlier rulings and specifically finding that personal interviews are essential to the exercise of both the prisoners' and medias' First Amendment rights, that the "big wheel" theory was unsubstantiated and that *Branzburg* was inapplicable. *Washington Post Co. v. Kleindienst,* Civ. 467-72 (D.D.C. December 19, 1972) (hereinafter "Washington Post II").

system." *Price v. Johnston,* 334 U.S. 266 (1948)[7] 2) Further, prison officials are properly given a great degree of discretion in the administration of penal institutions. *Stroud v. Swope,* 187 F.2d 850 (9th Cir. 1951); *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971) and cases cited at 1379. 3) But it is equally clear that a prisoner does not lose all constitutional rights with the slamming of the jailhouse door (*Gilmore v. Lynch,* 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd.* 400 F.2d 1092, *supra; Seale v. Manson, supra,* at 1379), particularly where the prisoner's First Amendment rights are imperiled. *Nolan v. Fitzpatrick,* 326 F.Supp. 209 (D. Mass. 1971), *reversed on other grounds,* 451 F.2d 545 (1st Cir. 1971), *Burnham v. Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972), *Washington Post Co. v. Kleindienst I, supra.*

That §415.071 abridges, to some degree, plaintiffs' freedom of expression is certain. But even in the "outside world" certain limitations on speech are constitutionally permissible. See, *Kovacs v. Cooper,* 336 U.S. 77 (1949). In determining whether this section is unconstitutional the court must first discern and then balance the prisoners' interests against those of the State.

Defendants argue that plaintiffs' First Amendment rights are sufficiently protected by the press regulation as it stands, in that *written* communications to the press remain unobstructed and personal interviews are permitted, albeit on the random basis described above.

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[7]Holding, *inter alia,* a prisoner is not entitled to personally appear at the hearing of his habeas corpus petition.

But the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say may, with bad luck, never be able to say it effectively. The court is of the opinion that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. Other courts have come to the same conclusion. In *Burnham v. Oswald, supra,* the court dealt with facts almost identical to those presented here. There, inmates at Attica State Prison and newsmen challenged prison regulations that were adopted shortly after the riot of September 9-13, 1971. The regulations permitted press interviews of inmates at the discretion of the Superintendent, who was authorized to deny a request if he determined it would adversely affect the "integrity" of the institution. "Integrity" was left undefined by the regulations. The court held that the regulations granted the Superintendent too broad a discretion in his determination of whether an interview could be held.

> "The court holds that an interview with a consenting inmate must be permitted unless it is determined that to hold the interview would present a clear and present danger of breach of the security, discipline or orderly administration of the institution, [citations omitted], or that the inmate had clearly abused his right of access to the press." 342 F.Supp. at 887.

A significant factor in the court's ruling was the finding that:

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Further, there are many prison situations which can only be explored fully and accurately by a face-to-face interview." 342 F.Supp at 885.[8]

A similar holding was enunciated in *Washington Post Co. v. Kleindienst* where the court was persuaded by the plaintiffs' argument that "[c]ommunication by correspondence is . . . too impersonal and timeconsuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write. Prison tours and related conversations with individuals or groups are . . . too hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation." *Washington Post I*, at p. 5; *Washington Post II*, at p. 1. See, also, Comment, A Prisoner-Press Interview Right, 11 Am.Crim. L.R. 273 (1972). The court fails to see how either of the two virtues of personal interviews—assisting inarticulate inmates express themselves clearly and verifying their stories—can in themselves be objected to by the authorities.

Which brings us to an evaluation of the prison's interest in the preservation of §415.071. It is a fundamental precept of constitutional law that when a state

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[8]But see *Smith v. Bounds*, Civ. No. 2914 (E.D.N.C. March 10, 1972) where it was held that written communication to the press sufficiently preserved the inmates' rights.

restricts a First Amendment right, especially when that restriction is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation. *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Edwards v. South Carolina*, 372 U.S. 229 (1962). This standard applies in the prison context (*Nolan v. Fitzpatrick, supra, Burnham v. Oswald, supra*, at 885, *Fortune Society v. McGinnis*, 319 F.Supp. 904 (S.D.N.Y. 1970), *Seale v. Manson, supra*, Cf. *Martinez v. Procunier*, C-71-543 (N.D. Cal., Feb. 2, 1973) (three-judge court), at pp. 7-8), despite language used by other courts, in dealing with similar cases, that at first glance appears to indicate a lesser standard should be employed. Defendants cite *Carothers v. Follette*, 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both "reasonably . . . and necessarily . . . to the advancement of some justifiable purpose of imprisonment." 314 F.Supp. at 1024. The court believes that this rule is not only consistent with the "compelling interest" test, it is its concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related—"reasonably and necessarily"—to the end sought.

To the extent that *Carothers* can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it

can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who have abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of "clear and present danger" in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably "compelling state interests" (See *Carothers, supra*, at 1024), regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights.

Turning to the instant regulation, the state has offered four grounds upon which it attempts to defend §415.071. None are sufficiently substantiated by fact to sustain the defense.

A.

Administrative Burden

The state anticipates that too wide an access by the press to inmates will result in an intolerable demand on facilities and man-hours. Defendants point to one history in which a prisoner was interviewed sixty-six times in a six-month period. On closer examination, however, this "example" was not only revealed to be a clear exception to the then prevailing practice but appears to have been totally media-initiated. In fact, the number of requests *by prisoners* for press interviews was minimal, as indicated in Warden Nelson's Answers to Interrogatories (filed April 10, 1972):

> "4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media?"
>
> * * *
>
> "A: We have no record of this information. *Requests by prisoners for interviews with media are rare, and none are recalled.*" (Emphasis added).

Additionally, the prison maintained no records as to the number of interviews initiated by media personnel although, presumably, such requests were somewhat more frequent. And insofar as the prisoner's right to interview is concerned, the Warden's response to Interrogatory #4 dispels any notion that prisoner-requested interviews have presented an extraordinary administrative burden. In short, the present regulation attempts to obviate an administrative problem that does not exist, and is therefore neither reasonably nor necessarily related to a legitimate state interest.

By holding that the State has made an insufficient factual showing of administrative burden, the court does not imply that reasonable limitations as to the time, place, and manner of such interviews cannot be imposed. On the contrary, it is obvious that regulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible. See *Seale v. Manson, supra*, at 1383.

B.

Security

Much of the State's argument with respect to the security factor of §415.071 hangs on the "big wheel" theory discussed in Subparagraph D *infra*. The court takes the defendants to argue, additionally, that the mere presence of large number of newsmen endangers the security of the prisons. It might first be noted that newsmen ". . . are not inherently security risks." *Nolan v. Fitzpatrick, supra*, at 213. And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at the hearing that "hundreds" of private citizens visit California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past[9]; and they have conspicuously failed even to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

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[9]The events of August 21, described above, were allegedly sparked by an inmate being given a weapon by an *attorney*.

Prison security is patently a legitimate concern of the defendants, but §415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it. As mentioned above, the number of interviews may be reasonably limited so as to assure adequate supervision by correctional officers. Likewise, the prisons officials may require interviews to submit to reasonable searches for contraband, escape plans, or weapons as a precondition to the interview. Finally, if the authorities have good cause to believe that a *particular* interview would pose a clear and present danger to prison security, it may be denied.

C.

Rehabilitation

The State offered little more than vague speculation as to how §415.071 advances the rehabilitative programs in California prisons and has thus failed to carry its burden of justifying the section on this ground.

D.

The "Big Wheel" Theory

Defendants' principal argument in defense of §415.071 rests on the "Big Wheel" or "celebrity" theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates. This understandably would have several undesirable effects. The elevation of individual prison-

ers to "celebrity" status is detrimental to the Department's disciplinary efforts, which are founded on the policy of treating all prisoners equally, giving no single prisoner specific privileges with which he might use to obtain an advantage over others. When an individual prisoner achieves a sense of special status he is able, defendants contend, to induce other inmates to combine and engage in behavior they otherwise would not exhibit. When two or more rival "big wheels" rise to power, a situation not unlike street gang warfare can result, leading to large scale intimidation, coercion and violence.

The spectre of such a state of affairs is indeed alarming. And this court entertains no doubt that violence exists in correctional institutions in California or that the Department's task of reducing violence is an exceedingly difficult one. The question here, however, is whether §415.071 is reasonably and necessarily related to that task, and the court must conclude that the "big wheel" theory, in the end, has been shown by defendants, *in this particular case*, to be little more than that—a theory. The events out of which §415.071 emanated and by which the Department has attempted to justify the rule—the August 21 incident—serve to illustrate the inapplicability of the theory in this case. One of the prisoners who was killed that day had been interviewed sixty-six times in a six-month period and had published a book composed of letters he had written to members of his family and his attorney which, in substantial part, were critical of society in general and prison administration in

particular. Mr. Guthrie described the prisoner as a "big wheel" and stated he believed the August 21 violence arose, in part, out of the theretofore liberal interview policy. However, when questioned further he admitted that the prisoner has in fact only a limited reputation outside prison and had not achieved "celebrity" status within it prior to August 21. Such status was attained only *after* his death. Mr. Guthrie also testified that between 1970 and the date of the hearing ten professional employees and twenty inmates were murdered in California correctional institutions and that in his opinion this violence can be attributed to the liberal interview policy and the influence of the "big wheels." But when asked to explain the nature of the connection between interviews and the violence neither Mr. Guthrie in his testimony, nor defense counsel in his argument, nor Mr. Procunier in his affidavit, could specify facts showing a direct relationship between the two.

Seattle-Tacoma Newspaper Guild, Local #82 v. Parker, supra, is distinguishable with respect to this issue on two grounds. First, the evidence in Seattle-Tacoma persuasively illustrated that the prison officials had made a "considerable study" of the interview practice and had "concluded that the ban on interviews is necessary to maintain the discipline, custody, and control of the prison." (Slip opinion at 5). As related above, no such showing was made in the present case; on the contrary, defendants' testimony compels a finding that no correlation between press interviews and prison disturbance exists. Secondly,

the *Seattle-Tacoma* case dealt with a regulation applicable only to McNeil Island Penitentiary, a maximum security institution designated for detention of selected prisoners who present serious disciplinary and security problems. (Slip opinion at 4). The regulations had been promulgated on the heels of a riot. Here, the challenged regulations are applied at *all* California state penal institutions, from maximum security prisons to work farms, without regard to the various safety and disciplinary characteristics within the system. On this ground alone the regulation is unconstitutionally overbroad.

Seale v. Manson, supra, cited by defendants in support of the theory is also inapposite. There the plaintiff was being held at a Connecticut state prison without bail on serious criminal charges. He challenged a regulation that expressly *permitted* press interviews with specific inmates, but required prior approval by the Warden. On two occasions reporters were denied access to Seale. The court held, and we agree, that the defendants had a legitimate concern in preventing a prisoner from becoming a "wheel" in the institution and that *limiting* (not, as here, totally excluding) interviews with specific inmates was a permissible means by which to achieve that goal. The court notes that in *Seale* it appears that plaintiff did not disclaim his reputation as a "wheel." In the present case it is not alleged that any of the named plaintiffs have shown a desire to become a celebrity. Mr. Guthrie stated that at the present time he is unable to name a single celebrity throughout the entire Cali-

fornia correctional system. The unavoidable conclusion is that no matter how plausible the "big wheel" theory, there is no hard evidence that the danger presented by interviews is either clear or present. The regulations flatly prohibiting such interviews are therefore unconstitutional.

VII.

For the reasons above, it is Adjudged, Ordered and Decreed that:

1. Defendants' motion for dismissal as against the media plaintiffs is Granted.

2. The inmate plaintiffs' motion for summary judgment is Granted.

3. Defendants shall within 30 days present to the court proposed regulations comporting to this decision.

4. Defendants shall permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision.

Dated: August 16 '77

United States Circuit Judge

United States District Judge

/s/ Spencer Williams

United States District Judge

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS, District Judges

HAMLIN, Circuit Judge, concurring:

For the reasons expressed in the majority opinion I concur in the holding therein that section 415.071 is not violative of the rights of the news media.

I concur also in the holding in that opinion that said section is violative of the rights of the plaintiff inmates, but I do so on a different basis.

The majority examines the constitutionality of the regulation prohibiting inmates from requesting interviews with the news media under the "compelling interest" test, applicable to First Amendment restrictions in society at large.

However, in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, ... F.2d ..... (9 Cir. June 7, 1973), the Ninth Circuit Court of Appeals eschewed the "compelling interest" test as applied to First Amendment restrictions in the prison context, and substituted therefore the "rational basis" analysis:

> "* * * the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any *rational* and constitutionally acceptable concept of a prison system.' (citation omitted). We find that the interview ban is *reasonable action* within the scope of the wide discretion of the prison administrators, and that it does not violate the prisoners' First Amendment rights." (citation omitted.)

> *Id.*, at ..... (slip opinion at 5-6) (emphasis added.) *See also, O'Malley v. Brierly,* 477 F.2d 785 (3 Cir. 1973); *Morales v. Schmidt,* ..... F.2d ..... (7 Cir. January 17, 1973).

While the specific factual situation in *Seattle-Tacoma* differs from the instant case, it is my conclusion that the *Seattle-Tacoma* rationale is herein controlling.

But even under the broader "rational basis" analysis, the blanket prohibition of inmate interviews with the media must fall. As the majority notes, there is insufficient evidence in the record to substantiate such a complete ban.

The defendants may, of course, refuse to permit specific inmates in specific circumstances from conducting interviews with the media, where legitimate reasons exist.

Appendix B

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United States District Court
Northern District of California

No. C-71 2150 SW
(Three-Judge Court)

Booker T. Hillery, Jr., et al.,
Plaintiffs

vs.

Raymond K. Procunier, et al.,
Defendants.

[Filed Sept. 12, 1973]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice Is Hereby Given that Raymond K. Procunier, Louis S. Nelson, James W. L. Park and Jo-

seph O'Brien, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting plaintiffs' motion for summary judgment, entered in this action on August 16, 1973.

This appeal is taken pursuant to Title 28, United States Code section 1253.

Dated: September 12, 1973

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General
Doris H. Maier, Assistant Attorney General-Writs Section
Edward P. O'Brien
Assistant Attorney General
John T. Murphy
Deputy Attorney General

Appendix C

United States Court of Appeals
For the Ninth Circuit

Seattle-Tacoma Newspaper Guild, Local #82, of American Newspaper Guild, Dwight Jarrell and Jessica Mitford, Plaintiffs-Appellants, George Sing Louie, Edward Allen Mead, John Van Veenendaal, and Sterling G. Amos, on behalf of themselves and all other persons similarly situated, Plaintiffs-Intervenors, vs. Jacob J. Parker, Warden, McNeil Island Federal Penitentiary and Norman A. Carlson, Director, United States Bureau of Prisons, Defendants-Appellees.	No. 72-2330

[June 7, 1973]

Appeal from the United States District Court
for the Western District of Washington at Seattle

Before: KOELSCH and WRIGHT, Circuit Judges, and BELLONI,* District Judge.

WRIGHT, Circuit Judge:

This appeal presents essentially one question: Does the First Amendment compel the warden of a federal

*Of the District of Oregon.

penitentiary to permit individual press interviews with prison inmates by representatives of the news media? Two aspects of the First Amendment are involved. Is the warden in violation of (1) the First Amendment rights of his prisoners or (2) the First Amendment right of press access to the news, when he prohibits press interviews with willing prisoners?

Suit was brought by the Guild (one-half of whose members are newspaper reporters) and two individuals, one of them a free-lance writer. Their complaint sought temporary and permanent injunctions enjoining the appellees from denying the plaintiffs

(a) The right to access to McNeil Island Federal Penitentiary,

(b) The right to interview prisoners and strike leaders,

(c) The right to take still and moving pictures inside the prison,

(d) The right to interview McNeil officials and employees, and

(e) The right of access to records and administrative directives at McNeil regarding prisoner treatment and prison life conditions.

There had been disruptions in the nature of a prisoner strike at McNeil in 1971 and emergency measures were taken by prison officials to restore order and to prevent recurrences. Members of the Guild sought to interview strike leaders among the more than 1,200 McNeil prisoners and to take statements from prison officials. Some Guild members went to the island by government vessel, accompanied by pho

tographers. They met with Warden Parker, Daggett's predecessor, and he refused permission for photographs, interviews with others or free access to prison records.

Until the disruptive strike, the policy of the prison had been to provide access to relatives, friends, attorneys, news media, social workers, interested citizens, members of charitable organizations and other visitors, usually at scheduled times. The policy was curtailed during the strike because many prisoners refused to report for regular duties and destroyed government property. Contemporaneously, a group of protesters gathered and demonstrated at the Government pier on the mainland, the terminus for the vessel which transported personnel and supplies to the island. These circumstances caused a deployment of prison forces to preserve order, protect government property and prevent bodily harm.

Intervenors are McNeil prisoners who joined in the suit on their own behalf and on behalf of others similarly situated. They, too, sought injunctive relief from the prison policy of prohibiting press interviews. They claimed the policy violated their First Amendment rights of free speech, free press and the right to petition for redress of grievances.

While the suit was pending, the Bureau of Prisons reviewed its policies concerning access to prisons by press personnel. In February 1972, it issued a revised Policy Statement which defined news media,[1] recog-

[1]"A newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station." (Policy Statement 1220.1A, ¶4a).

nized the right of inmates to have access to the media by correspondence,[2] and provided for other confidential correspondence from inmates.[3]

The Policy Statement further provided encouragement to press representatives to visit institutions for the purpose of reporting on facilities and programs,[4] but with some limitations. Specifically, press interviews with individual inmates were prohibited.[5] It is this prohibition that is now challenged by both the press and the inmates.

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[2]"A representative of the news media may initiate correspondence with a particular inmate. Incoming correspondence from the news media will be inspected solely for contraband, or for content which would incite conduct which is illegal. Rejected correspondence will be returned to the sender, with an explanation. Questions to the inmate may be presented through this correspondence, and the inmate may respond through the Prisoners Mail Box." (Policy Statement 1220.1A, ¶4b(2)).

[3]The prisoners may send confidential messages to:

(1) The United States Courts;
(2) Members of the United States Senate and the House of Representatives;
(3) The Director of the United States Bureau of Prisons;
(4) The Attorney General of the United States;
(5) The President and the Vice President of the United States;
(6) Members of the United States Board of Parole;
(7) The Pardon Attorney;
(8) The Surgeon General, United States Public Health Service;
(9) The Secretaries of the Army, Navy, and Air Force.

Bureau of Prisons Policy Statement, No. 7300.2B.

[4]"Representatives of the press are encouraged to visit Bureau institutions for the purpose of preparing reports about institutional facilities, programs and activities." (Policy Statement 1220.1A, (5)).

[5]"Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." (Policy Statement 1220.1a, ¶4b(6)). (The second sentence above permits only casual conversations held in the course of prison tours.)

Experience in other institutions, said the Bureau of Prisons, led it to conclude that inmate interviews would adversely affect prison discipline and administration.

The Bureau found that interviews had two separate damaging consequences: (1) disciplinary problems increased, following interviews with disruptive or non-cooperative prisoners, who encouraged others to adopt their hostile approach, and (2) prisoners interviewed became celebrities or "big wheels," less subject to constructive rehabilitation. The Bureau believes that all prisoners should receive equal treatment, except for individual physical, mental and moral needs. Defendant Carlson, Bureau Director, supplied the district court with an affidavit on this subject.[6]

In his oral decision, the district court noted that McNeil is a "maximum security" institution, designated for detention of selected prisoners. Its officials face serious disciplinary and security problems because McNeil has few first offenders and many recidivists with multiple convictions of crimes of violence. Finding that the rule against inmate interviews "is calculated to avoid a disruptive influence in the inter-

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[6] "• • • Prisons invariably have inmates drawn from all walks of life, including the rich and the poor, the prominent and the obscure, the celebrated and the unknown. Prison life is intended to provide an equality of living without echelons of strata based upon past civilian life. If publicity or renown were accorded individual prisoners by publicity, favorable or unfavorable, it would violate this principle and create further internal rivalries within the prison and tend to promote special treatment of such persons.

"Limiting interviews would not eliminate and at best could reduce the adverse effect described above because it would still result in allowing special treatment for individuals of renown or who seek publicity. • • •" (Tr. 230, 364)

nal operation" of a federal prison, the court concluded that the Bureau regulation is not unconstitutional or oppressive but is "reasonable and is designed to give the administration of the institution some flexibility to adequately meet their responsibilities."

All parties having moved for summary judgment, the district court granted the motion of appellees and dismissed the action.

THE INMATES

It is axiomatic that prison inmates retain constitutional rights, and that "a prisoner does not shed his first amendment rights at the prison portals." *Brown v. Peyton,* 437 F.2d 1228, 1230 (4th Cir. 1971). However, it is equally clear that ". . . [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948).

As another Court of Appeals has pointed out:

> "Imprisoned felons and inmates of such institutions * * * cannot enjoy many of the liberties, the rights and the privileges of free men. They cannot go abroad or mount the housetops to speak. They are subjected to rigid physical limitations and to disciplinary controls which find no shred of justification in any other context. Even the disciplinary powers of military authorities are not so absolute." *McCloskey v. Maryland,* 337 F.2d 72, 74 (4th Cir. 1964).[7]

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[7] *See also, Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971) (en banc) *McDonough v. Director of Patuxent,* 429 F.2d 1189 (4th Cir. 1970).

The Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison and the safety and rehabilitation of its inmates, and accordingly they must be given wide discretion in formulating rules to govern prison life. In the instant case the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion "lacks support in any rational and constitutionally acceptable concept of a prison system." *Sostre v. McGinnis,* 442 F.2d 172, 199 (2d Cir. 1971) (en banc). We find that the interview ban is reasonable action within the scope of the wide discretion of the prison administrators and that it does not violate the prisoners' First Amendment rights. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969).

In concluding that the institutional concerns override the interest of the individual inmate in talking face to face with a member of the news media, we note that such a deprivation will not allow any real complaint about the treatment of the inmate or the administration of the prison to go unredressed. Prisoners are allowed by Bureau regulation to confer freely with their counsel, to conduct unlimited confidential correspondence, to visit with relatives and friends, to counsel with clergymen of their faith, and most important, to have free access to the courts. This court, as others, gives prompt and careful attention to prisoner peti-

tions[8] alleging violations of civil rights[9] and counsel is appointed to assist the prisoner in those cases where the need therefore is demonstrated.

THE PRESS

Federal prisons are public institutions, and their administration is a matter of concern to all citizens. Decisions recognizing "the paramount public interest in a free flow of information to the people concerning public officials, their servants,"[10] are equally applicable in the realm of prison administration. The importance of the media in providing public information

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[8]Prisoner petitioners drawn *pro se* are also held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519 (1972.

[9]*Haines v. Kerner*, 404 U.S. 519 (1972) (State prisoner appearing *pro se* is entitled to a hearing on his allegations that he suffered injuries while being subjected to confinement without due process.)

Wilwording v. Swenson, 404 U.S. 249 (1971) (State prisoners need not exhaust state remedies before bringing Civil Rights action to challenge living conditions and disciplinary measures.)

Keeton v. Procunier, 468 F.2d 810 (9th Cir. 1972). (State prisoner is entitled to a hearing on his Civil Rights Act claim that state officials ran a kangeroo court inquisition before rescinding his parole recommendation).

McMann v. Wright, 460 F.2d 126 (2d Cir. 1972) (State prisoners are entitled under Civil Rights Act to damages against warden for "barbarous and inhumane" treatment by deputy warden.)

Nosser v. Bradley, 456 F.2d 835 (5th Cir. 1972) (10 CrL 2482) (Allegation of summary arrest and inhumane confinement states cause of action under Civil Rights Act.

[10]*Garrison v. Louisiana*, 379 U.S. 64, 76 (1964). *See also Time, Inc. v. Hill*, 385 U.S. 374 (1967), *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *New York Times Co. v. United States*, 403 U.S. 713 (1971).

about the conduct of these institutions is undisputed. Indeed, it has often been through the zealous efforts of the news media that failures in a particular institution have been exposed.

We are acutely aware of the public's need for information in this area. However, we do not accept the argument that the public interest in having its prisons secure and free from disruptive influences and in the rehabilitation of prisoners is insufficient to outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews.

We have already noted that the regulation in question is rationally related to the achievement of legitimate goals of prison administration. Appellant Newspapers Guild argues that despite the wide discretion allowed administrators in the formulation of rules and regulations governing prisons, there is nonetheless an absolute right to gather news, citing *Branzburg v. Hayes,* 408 U.S. 665 (1972):

> "We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection: without some protection for seeking out the news, freedom of the press could be eviscerated." At 681.

However, ". . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information," *Zemel v. Rusk,* 381 U.S. 1, 17 (1965), and accordingly the issue we must decide is whether the interview ban unduly restricts the flow of information

to the public. In concluding that it does not[11] we again call attention to the Bureau's regulations giving news media extensive access to prison facilities and personnel, as well as the right to unlimited confidential correspondence with inmates. We are convinced that any hampering of the ability of the media to report occasioned by the interview ban is more than justified by the persuasive reasons given for its formulation.

It should be noted, however, that in this suit the interview ban dictated by the regulation is being attacked only insofar as it is applied at McNeil Island Penitentiary, a maximum security institution. Our holding today does not concern the application of the regulation to the wide variety of other institutions employed in the incarceration and rehabilitation of federal offenders.

The order of the district court granting summary judgment is affirmed.

CONCURRING SPECIALLY

KOELSCH, Circuit Judge.

As I read the record, the court below dismissed the actions on Rule 12(b)(6) grounds and did not, as the majority opinion seems to suggest, resort to nor pass

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[11] *See also Smith et al. v. Bounds, et al.* (E.D.N.C. Mar. 10, 1972); *contra, Washington Post, et al. v. Kleindienst, et al.* (D.D.C. unreported memorandum opinion of April 5, 1972, as supplemented by opinion of Dec. 19, 1972). *Cf. Yarish v. Nelson*, 104 Cal.Rptr. 205 (1972), petition for rehearing denied by the California Supreme Court, November 16, 1972.

upon the parties' respective Rule 56 motions for summary judgment.

Had it been necessary for the court to consider the latter motions, then we should reverse, for plaintiffs tendered a number of counter-affidavits setting out facts purporting to support their allegations that the questioned provision of the revised "Policy Statement" of February 11, 1972, violated, and were being applied in a manner that violated, their First Amendment rights. However, upon inspection of those provisions, the conclusion is manifest to me that none of them have, or could have, such an effect. The provisions are narrowly drawn and prohibit specific conduct that would, at least arguably, infringe upon a substantial federal interest in protecting the federal penal system. In short, I am firmly convinced that plaintiffs neither stated, nor could they state, any actionable claim or claims, and that we need not, indeed should not, suggest otherwise.

I concur in the result.

73-91

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-918

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1973

No. .....

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Northern District of California, specially constituted pursuant to the provisions of Title 28, United States Code section 2284, entered on August 16, 1973, insofar as it dismissed the appellants' claim for a right to interview prisoners in the California prison system. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the district court filed August 16, 1973, is presently unreported. A copy of that opinion is attached to the jurisdictional statement of appellees, who are appellants in No. 73-754, and references to that opinion in this statement are to that Appendix, herein referred to as "Calif. App."

Appellants Eve Pell, Betty Segal and Paul Jacobs are, respectively, free lance, newspaper, and television journalists,* each of whom wishes to interview prison inmates. Appellees are Raymond K. Procunier, Director of the California Department of Corrections; Louis S. Nelson, Warden of the California State Prison at San Quentin; James W. L. Park, Associate Warden of the California State Prison at San Quentin; and Joseph R. O'Brien, Public Information Officer at the California State Prison at San Quentin.

Jurisdiction

This suit was brought by appellants and by prison inmates who are the appellees in No. 73-754, for injunctive and declaratory relief under the authority of Title 42, United States Code section 1983, and Title 28, United States Code sections 1343(3), 1343(4) and 2201. Appellants asked the district court to declare that Section 415.071 of the California Department of Corrections Manual was in violation of the United States Constitution and to enjoin appellees from enforcing such provision.

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* "Press" and "journalists" will be used henceforth to refer to newspapers, magazines, radio, television, film, and book-authorship on the premise that no fundamental distinction between these media exists except where specifically indicated.

The order of the district court was entered on August 16, 1973. Notice of appeal to this Court was filed in the district court on October 11, 1973. A copy of the notice of appeal is attached hereto as Appendix A.

The jurisdiction of the three-judge district court was established pursuant to the provisions of Title 28, United States Code section 2284. The jurisdiction of this Court to review the decision of such a specially constituted district court by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal. *Younger v. Gilmore*, 404 U.S. 15 (1971); *Zemel v. Rusk*, 381 U.S. 1 (1965).

State Provision Involved

California Department of Corrections Manual Section 415.017:

> "Press and other media interviews with specific individual inmates will not be permitted."

Questions Presented

1. Whether journalists have a right under the First Amendment to interview state prisoners, except where a compelling state interest justifies curtailment of such right in individual situations?

2. Whether the district court, following the authority of the United States Court of Appeals for the Ninth Circuit, misconstrued *Branzburg v. Hayes*, 408 U.S. 653 (1972), and in a manner inconsistent with decisions by other courts?

3. Whether journalists have no rights under the First Amendment to interview prisoners even though prisoners are granted First Amendment rights to give such interviews?

Statement of the Case

On November 8, 1971, Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that appellees Procunier, Nelson and Park were denying him an interview with the editors of Earth Magazine. An order to show cause was issued by a single-judge district court and on January 13, 1972, appellees filed a return asserting that the complaint did not pray for equitable relief or state facts entitling appellant to such relief, did not allege exhaustion of administrative remedies and did not show a violation of a federal right, a prospect of irreparable harm or a likelihood of appellant prevailing on the merits. Upon hearing on the order to show cause, counsel was appointed for Hillery and, on March 8, 1972, a first amended complaint for damages and declaratory and injunctive relief was filed.

The amended complaint added as plaintiffs three inmates, John Larry Spain, Bobby Bly and Michael Shane Guile and also appellants Eve Pell, Betty Segal and Paul Jacobs; it also added as a defendant the appellee Joseph O'Brien. The new pleading alleged the original claim of Hillery and further alleged that Eve Pell was a freelance author who had been denied a request to interview with Spain, that Betty Segal was a newspaper reporter whose request to interview Bly was disapproved and that Paul Jacobs was a television reporter who had unsuccessfully sought permission to interview Guile. The amended complaint "sought to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel"; it made no specific reference to Section 415.071 of the California Department of Corrections Manual.

On April 6, 1972, appellees moved to dismiss the amended complaint and subsequently, both sides filed further points and authorities in support of their respective positions during the course of which Section 415.071 was brought to the court's attention. On September 29, 1972, the single-judge district court issued an opinion and order declaring Section 415.071 invalid as a violation of the First Amendment, permanently enjoined the enforcement thereof and directed appellees to submit a proposed new rule consistent with the opinion. On October 4, 1972, appellees filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and the plaintiffs did not oppose the motion. Consequently, on November 1, 1972, the September 29 opinion and order were set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.*

The matter was heard before the three-judge district court on February 24, 1973. After the filing of additional memoranda by the American Civil Liberties Union, *amicus curiae*, and by appellees, the matter was submitted.

The opinion of August 16, 1973 sets forth the facts about which there is no significant dispute. The district court found that prior to the late 1960's interviews between prisoners and the press were relatively infrequent. However, the number of requests for such interviews increased substantially, with the rise of discontent within the prisons and the consequent increase in public concern and interest.

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* Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were approved by the single-judge court on February 8, 1973.

On August 21, 1971, three San Quentin staff members and two inmates were killed, and prison officials apparently attributed this in part to press interviews. Section 415.071 was therefore promulgated, banning all such interviews. In its findings, however, the court found that there was no evidence of a "direct relationship" between press interviews and prison violence. Calif. App. xviii. Nor was there evidentiary support for any other interference with legitimate state interests, such as administrative efficiency and rehabilitation, by such interviews. The court therefore struck down the regulation on the ground that it interfered with the prisoners' rights under the First Amendment, although it noted that reasonable limitations as to time, place and manner were appropriate, and that if a particular interview were shown to pose a clear and present danger to prison security, it could be denied.

Despite the above findings and conclusions, however, the district court read *Branzburg v. Hayes*, 408 U.S. 653 (1972), and the decision of the United States Court of Appeals for the Ninth Circuit in *Seattle-Tacoma Newspaper Guild v. Kleindienst*, ____ F.2d ____, 72-2330 (6/7/73), as precluding a First Amendment right to prison interviews for the press. It therefore dismissed the journalist-appellants claims. They filed a notice of appeal on October 11, 1973.*

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* A copy of the Notice of Appeal is filed as an Appendix hereto, which is cited as "App. 19."

The Questions are Substantial

The district court's ruling substantially and unjustifiably interferes with the freedom of the press and the community's right to hear. Plenary review of the decision is necessary to clarify the many conflicting decisions of this issue.

1. Journalists have an independent constitutional right under the First Amendment to interview prisoners, which is ultimately based on the community's right to hear. This right is separate and different from a prisoner's right to communicate. The journalists' independent right is particularly important where, for example, the prisoner is a willing source of information needed by the journalist but does not have a particularly strong interest in seeking the opportunity to disclose it.

2. The district court decision wrongly denied the journalist-appellants the right to interview California prisoners because:

a. All of the arguments supporting a prisoner's right of expression support the community's right to hear and press access therefor; indeed, the court paradoxically found that the press and the community had *fewer* rights in this area than convicted prisoners.

b. The decision is inconsistent with most of the decisions that have dealt with the issue; no appellate case has yet established that a flat ban on interviews in all institutions in a system is permissible.

c. (1) The district court wrongly construed *Branzburg v. Hayes*, 408 U.S. 665 (1972) and allowed the press less access than is available to the general public.

(2) The district court wrongly concluded that face-to-face interviews were not essential to adequate reporting.

d. The considerations offered by the State of California to justify its ban are insufficient, and the district court properly rejected the State's contentions in upholding the prisoners' rights to communicate to the press. The proper constitutional criterion is the "compelling interest" test, and the State offered no persuasive evidence for its claims that administration, rehabilitation, or security were seriously interfered with by such interviews. In any event, case-by-case treatment and reasonable regulation are adequate to take care of whatever particular problems may develop.

ARGUMENT

I. Plenary review of the district court decision is necessary in order to deal with the increasing number of cases and conflicts relating to press access to prisoners for face-to-face interviews.

A. The large and diverse numbers of press access suits and decisions justify plenary review herein.

Prisons, prisoners, and the entire criminal justice system have come under public scrutiny to an unprecedented degree. The press has therefore become increasingly interested in access to prisoners and prisons, but until recently, most prison administrations have prohibited such access. As a result, suits by the press to gain such access have proliferated in recent years. See, *e.g.*, *Burnham v. Oswald*, 333 F.Supp. 1128 (W.D.N.Y. 1971), 342 F.Supp. 880 (W.D.N.Y. 1972); *Washington Post v. Kleindienst*, 357

F.Supp. 770, 779 (D.D.C. 1972), *appeal pending; Wicker v. Mitchell*, Civ. 112-72 (D.D.C.) (stayed pending outcome of *Washington Post v. Kleindienst, supra*); *Seattle-Tacoma Newspaper Guild v. Parker*, ____ F.2d ___, 72-2330 (9th Cir. 6/7/73); *Houston Chronicle Pub. Co. v. Kleindienst*, ____ F.Supp. ____ Civ. 72-H-1657 (S.D. Tex. 8/24/73):* *Mitford v. Pickett*, 363 F.Supp. 975 (E.D. Ill. 1973), *appeal pending; McMillan v. Carlson*, Civ. 72-2551-M (D. Mass.); *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (Ct.App.1st 1972) and *Globe Newspaper Co. v. Bork*, Civ. #73-3748G (motion for prelim. inj. filed 12/73 D. Mass.) *cf., Smith v. Bounds*, ____ F.Supp. ____, Civ. 2914 (E.D. N. Car. 3/14/72) (prisoner's suit); *Seale v. Manson*, 326 F.Supp. 1375 (D. Conn. 1971) (prisoner's suit); there may well be other cases unknown to appellants. These suits have had varied and often conflicting outcomes and the decision of the district court aggravates matters, for it paradoxically finds a prisoners' right of access to the press but no press right of access to the prisoners.

B. Relief for the prisoners does not provide adequate relief for the journalist-appellants.

Recognition of a prisoners' right to communicate does not fully meet the needs of the press, for several reasons:

(1) A journalist may seek information from someone who happens to be in prison, but who has no strong concern or interest in communicating that information; such information may not even involve prison matters. Thus, in *McMillan v. Carlson, supra*, plaintiff is writing a book on James Earl Ray. He seeks to interview Ray's brother,

* This as yet unreported opinion is reprinted in the Appendix hereto, at pp. 21-46 below.

John, who is presently confined in Marion Federal Penitentiary, for information about James Earl Ray's early life.* Other instances come readily to mind. In such situations the prisoner probably has relatively little interest in asserting his constitutional rights, whatever they are, but the community's desire and right to know is very strong.

(2) The State of California construes the district court opinion as limiting access to interviews initiated by prisoners. See Jurisdictional Statement in *Procunier v. Hillery*, No. 73-754, pp. 8-9. If this interpretation stands up, then the press will gain virtually nothing from the decision since Mr. Procunier's Interrogatories reveal that "requests by prisoners for interviews with media are rare, and none are recalled." See Calif App. xiv.

(3) Finally, the press is usually in a far better position to urge and further its interests in obtaining information than is the prisoner in getting it out, for many prisoners fear reprisals, see, *e.g.*, *Houston Chronicle Pub. Co. v. Kleindienst*, App. 22.

II. The district court decision denied the journalist-appellants their rights under the First Amendment.

A. The district court's conclusions on the prisoner's rights are inconsistent with its denial of press rights.

The decision below is internally inconsistent, for all of the State's arguments that the district court rejected when considering the prisoner's First Amendment rights, apply equally to the journalists' rights. In its very careful and thorough opinion, the district court found no factual support whatsoever for any of the arguments put forth by

* The Federal Bureau of Prisons refused to allow this interview because of its general policy against inmate-press interviews.

the State; indeed, Judge Hamlin concurred in the decision even though he applied the "rational basis" test, which is the easiest constitutional standard for the State to meet. The same facts and legal considerations would seem to apply to the journalists' requests for press-prisoner interviews as apply to a prisoner's request for these same interviews.

The decision therefore has the anomalous result of treating the prisoners' right to communicate, better than it treats the community's right to hear and the derivative media right to gather news, despite the loss of rights normally suffered by prisoners, see *Price v. Johnson*, 334 U.S. 266, 28 (1948), and the "punitive regimen" supposedly appropriate for prisoners. *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971); *Nolan v. Scafati*, 306 F.Supp. 1, 3 (D. Mass. 1970), *rev'd on other grounds*, 430 F.2d 548 (1st Cir. 1971). See Comment, *Public and Press Rights of Access to Prisoners after* Branzburg *and* Mandel, 82 YALE L. J. 1337, 1342 n.36 (1973) (criticizes district court decision).

B. The district court decision is inconsistent with almost all other decided federal cases.

Only one other case dealing squarely with media access to prisons has taken the same position upholding a flat and total ban on journalists. *Mitford v. Pickett*, 363 F.Supp. 975 (E.D. Ill. 1973). The reliance on *Seattle-Tacoma Newspaper Guild v. Parker, supra*, by the court below was not fully warranted, since even that decision concluded by noting:

> "that in this suit, the interview ban dictated by the [federal] regulation is being attacked only insofar as it is applied at McNeil Island Penitentiary, a maximum security institution. Our holding today does not concern the application of the regulation to the wide

> variety of other institutions employed in the incarceration and rehabilitation of federal offenders." Calif. App. C.

Indeed, the district court explicitly noted this distinguishing feature of *Seattle-Tacoma* in discussing the prisoners' rights to communicate. Calif. App. xix.*

The district court's efforts to distinguish the *Washington Post* decisions is equally unsuccessful. Contrary to the district court's reading of that case, the federal regulation did not bar "*all* interviews with inmates at federal penitentiaries," for there was "*some* access" already. Calif. App. viii. In federal prisons, the press had the same right as in California prisons "to enter the . . . institutions and interview at random." See 357 F.Supp. at 771 ("Bureau policy . . . permits . . . casual conversations held in the course of prison tours").

Almost all other decided cases have condemned a general and absolute bar. See, *e.g.*, *Burnham v. Oswald*, 342 F.Supp. at 884-85; *Houston Chronicle Pub. Co. v. Kleindienst*, *supra*; *Washington Post v. Kleindienst*, *supra*; *cf. Mimms v. Phila. Newspapers, Inc.*, 352 F.Supp. 862, 866 (E.D. Pa. 1972). *Contra*, *Smith v. Bounds*, *supra*. Other decisions have involved individualized limitations, *Seale v. Manson*, *supra*; *Yarish v. Nelson*, *supra*, with which journalist-appellants have no quarrel.

Despite what seems to be a growing consensus, it remains difficult to derive a clear rule as to the press's rights to interview prisoners, and full review is necessary to resolve the uncertainties and differences.

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* Even *Mitford v. Pickett* may be read as not fully validating a system-wide rule, since the Court relied on *Seattle-Tacoma* and noted the similarity between Marion Penitentiary and McNeil Island with respect to their maximum-security status. 363 F.Supp. at 978.

C. The district court misconstrued *Branzburg v. Hayes*, 408 U. S. 665 (1972).

The premise of the district court's decision is a misconstruction of *Branzburg v. Hayes*, 408 U.S. 665 (1972), a misconstruction that it drew directly and explicitly from the *Seattle-Tacoma* case. The Ninth Circuit and the district court both held that *Branzburg* denied to journalists any "special access to information not available to the public generally," 408 U.S. at 684, and that this case "as in *Branzburg*," involves "no prior restraint or restriction on what the press may publish." *Zemel v. Rusk*, 381 U.S. 1 (1965) was cited for the proposition that the "right to speak and publish does not carry with it the unrestrained right to gather information."

Journalist-appellants are not, however, seeking "special access to information not available to the public generally," or an "unrestrained right to gather information"—they simply want the same access that many members of the general public already have. See *Washington Post Co. v. Kleindienst*, 357 F.Supp. at 783 ("Newsmen merely seek the same rights to interview at prisons which are afforded clergymen, congressmen, friends, and attorneys, as traditionally available to the public"); *Houston Chronicle Pub. Co. v. Kleindienst*, App. 33. As the district court found, "'hundreds' of private citizens visit California penal institutions every day . . . participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to lawyers." Calif. App. xv.

Proceedings that are secret and kept from the general public or are private may be covered by *Branzburg*, see 408 U.S. at 684-85; *cf. Lloyd v. Tanner*, 407 U.S. 551 (1972), but surely not places open to "hundreds" of people

daily, with 10,000 annual visitors at San Quentin alone. See *Nolan v. Fitzpatrick*, 326 F.Supp. 209 (D. Mass. 1971), *aff'd*, 451 F.2d 545 (1st Cir. 1971); *Kovach v. Maddux*, 238 F.Supp. 835 (D. Tenn. 1965); *Lee v. Hodges*, 321 F.2d 480 (4th Cir. 1963); *Providence Journal Co. v. McCoy*, 94 F.Supp. 186 (D. R.I. 1950), *aff'd on other grounds*, 190 F.2d 760 (1st Cir. 1951); *Associated Press v. KVOS*, 80 F.2d 575, 581 (9th Cir. 1935), *rev'd* on other grounds, 299 U.S. 269 (1936).

This, of course, is simply a logical implication of the right to gather news, which was recognized in *Branzburg* several times, 408 U.S. at 681, 707, and which in turn, is a derivative of the community's right to hear. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Red Lion Bdcstg. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). See generally, Comment, 82 YALE L. J. at 1346-49. That latter right was confirmed in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), though there, the executive's plenary power over aliens was held adequate to override that right. Here, of course, there is no such overriding plenary power.

Branzburg thus speaks only to individualized restrictions, especially where the restriction is quite indirect and rather uncertain in effect, 408 U.S. at 693-95. *Branzburg* did not justify a complete bar to access—it merely allowed an "uncertain burden," *i.e.*, the fear of ultimate disclosure. Even there, Mr. Justice Powell stressed the need for case-by-case balancing, see 408 U.S. at 709-10, and lower courts have upheld even a *Branzburg*-type privilege in settings outside the grand jury. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972); *Bursey v. United States*, 466 F.2d 1059, *reh. denied*, 466 F.2d 1090 (1972).

Moreover, where there is a possible encroachment on the First Amendment, the least drastic alternative must be

used, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Limitations must be on "an individualized basis, not by means of broad classifications." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1971). Here, the *most* drastic alternative has been chosen, for as numerous courts have recognized, face-to-face interviews are essential. *Washington Post Co. v. Kleindienst*, 357 F.Supp. at 781; *Burnham v. Oswald*, 342 F.Supp. at 885; *Kleindienst v. Mandel*, 408 U.S. at 765. The problem is especially acute for television and radio reporters, for whom aural and visual contact is often essential.

Even the grant of a right to prisoners to communicate does not provide an adequate alternative, for the reasons suggested above, *supra* at pp. 9-10.

D. There is no justification for the failure to recognize journalist-appellants' rights.

All the reasons given for the recognition of a prisoner's right to communicate apply with even more force to the press, who implement the community's right to hear. Indeed, one of the two cases cited by the district court for its holding that the state must show a "*compelling* interest" when it restricts the First Amendment by a prior restraint is *New York Times Co. v. United States*, 403 U.S. 713 (1971), a press case. Calif. App. xii. Further, the need must be shown to be especially compelling, where there is a broad, all-inclusive regulation. *Houston Chronicle Pub. Co. v. Kleindienst*, App. 44-45.

The district court's rejections of the various state justifications—administrative convenience, security and rehabilitation—apply equally to the press rights. And each is thoroughly supported by the record. The "big wheel" theory

provides as little support for the statewide absolute ban here, as it did in the *Washington Post* case, where the Court concluded, after a lengthy evidentiary hearing: "The 'big wheel' justification did not withstand analysis," 357 F.Supp. at 781. Here, it was agreed by all, and the district court found, that "none of the prisoner plaintiffs has been alleged by the defendants to have presented security risks; nor have defendants alleged a proclivity of these plaintiffs to create security risks." Calif. App. ii. This is in sharp contrast to *Seale v. Manson*, and even to the *Seattle-Tacoma* case where the decision was limited to McNeil Island, a maximum security institution which had just suffered a serious disruption.

Indeed, Director Procunier himself admitted the feasibility of a more flexible rule. In the very *Washington Post* testimony quoted in Mr. Procunier's jurisdictional statement in No. 73-754, he indicated that he could grant interviews on an individualized basis, and that he actually would have preferred to do so. However, his attorneys told him that no interviews could ever be permitted to anyone unless they were always permitted to all. Thus, he testified:

> "The Witness: My attorney suggested to me—we were thinking along the same lines you are suggesting—that I had to make it apply to everyone or I would not be allowed the prerogative that you suggest here. That is the only reason I have it across the board.
>
> The Court: In other words, as a correctional matter, putting aside legal considerations, you would tend to want to make the non-interview thing selective also?
>
> The Witness: Yes, sir."
>
> *Washington Post Co. v. Kleindienst* transcript, 3/23/72, p. 136. See also pp. 134-35.

This point was duly noted in the *Washington Post* opinion, where the court commented that "were it not for questionable legal advice, [Director Procunier] would still permit interviews in many sectors of his statewide correctional system." 357 F.Supp. at 774.

Mr. Procunier's testimony was very much in line with that of many other recognized correctional experts. Thus, Federal Parole Board Chairman Maurice Sigler has stated:

> "The media can be an enormous asset to corrections, and it often has been. It is for the most part committed to correctional improvement, and it has been most vocal in this respect during the past year. Reporters should be invited to look over our programs, our activities, and our facilities. They ought to be able to talk to any of our clients. Sometimes they won't be told the truth. Sometimes they will be misled. But in time, as they gain understanding, they will be able to do a better job of separating fact from fiction." Sigler, *New Partnership in Corrections*, 12 CrL 2042, 2043 (10/11/72).

And see Corrections Standard 2.17, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973), and Commentary, *id.* at 68; Recommendations of the Association of State Correctional Administrators reported in Comment, *A Prisoner-Press Interview Right*, 11 AM. CR. L. REV. 273, 288 n. 73 (1972).

Conclusion

The decision of the district court dismissing the journalist-appellants' claim presents substantial constitutional questions, and jurisdiction should be noted.

Respectfully submitted,

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Dated: December 7, 1973,
Buffalo, New York.

APPENDIX "A"

Notice of Appeal to the Supreme Court of the United States

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BOOKER T. HILLERY, JR., *et al.*,

Plaintiffs,

vs.

RAYMOND K. PROCUNIER, *et al.*,

Defendants.

No. C 71 2150 SW.

NOTICE IS HEREBY GIVEN that the plaintiffs in the above entitled action hereby appeal to the Supreme Court of the United States from the final order granting defendants' motion for dismissal as against media plaintiffs, entered in this action on August 16, 1973.

Notice of Appeal to the Supreme Court of the United States

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Respectfully submitted,

RICHARD M. DOCTOROFF,
PATTI ROBERTS,

By RICHARD M. DOCTOROFF,
Richard M. Doctoroff.

Dated: October 11, 1973.

CERTIFICATE OF SERVICE.

On October 12, 1973, I hand delivered a copy of this notice of appeal to the office of Defendants' attorney, John Murphy, 6000, State Building, San Francisco, California.

RICHARD M. DOCTOROFF.

APPENDIX "B"

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

HOUSTON CHRONICLE PUBLISHING COMPANY,

v.

RICHARD G. KLEINDIENST, *et al.*

Civil Action No. 72-H-1657

This suit seeks declaratory and injunctive relief. Plaintiff, the Houston Chronicle Publishing Company [hereinafter referred to as "Chronicle"], has sued the Attorney General of the United States and, as his agents, M. F. Rousseau, U. S. Marshal for the Southern District of Texas, Jack Heard (substituted for C. V. "Buster" Kern), Sheriff, Harris County, Texas, and J. B. Kline, Sheriff, Galveston County, Texas [hereinafter referred to collectively as the "Government"]. Jurisdiction is founded on the first amendment to the United States Constitution, 28 U.S.C. § 1346 and 28 U.S.C. § 1361. Plaintiff alleges that the newspaper's right to gather news, the prisoners' right to speak, and the public's right to know have all been violated by an across-the-board denial of all interviews.

Plaintiff, through its city editor, sought interviews with two federal inmates. Sabastian Mirelez was being held in

Houston in pretrial confinement on eight counts of income tax evasion. Ronnie Stewart was being held in Galveston in postconviction confinement so that he could testify as a Government witness in a pending federal criminal case under investigation. At the outset of the suit there was nothing in the record to indicate that these prisoners had expressed a desire not to be interviewed and some indication that Mr. Stewart wished to be interviewed. By the time the hearing was held the situation had changed. Mr. Stewart testified that he feared for his life and under no circumstances would he consent to an interview with the Chronicle or any other newspaper. Mr. Mirelez' sister testified that her brother did want to be interviewed. She exhibited a letter written by her brother to a Chronicle reporter and sent to her. The letter indicated that Mr. Mirelez desired to see the reporter. The newspaper was refused the interviews by the officials of both jail facilities.

Federal prisoners who are kept in the Harris County and Galveston County jails are held pursuant to contracts between the United States Bureau of Prisons (an agency of the Department of Justice) and each of the two counties.

The hardest of all the tasks confronting the court in this case was discovering what exactly the "rules" were and where these "rules" were to be found. All the witnesses called to testify about the rules and their operation seemed to agree that interviews with the press were a bad idea, but each had his own source. There are three potential sources for the "rules." First, there is Section 4 of "Exhibit A," attached to the contracts between the Bureau of Prisons and the respective jails. Exhibit A is a list of rules and regulations to be followed by the county jails in connection with the detention of federal prisoners. Second,

there are the rules issued by Harris County Sheriff Jack Heard, governing press and television interviews,[1] visits, and receipt of mail by the inmates of the Harris County detention facilities. Third, there is a policy statement of the Bureau of Prisons, No. 1220.1A issued February 11, 1972, which flatly forbids interviews with federal prisoners.

The connection between the contracts with the two jails and the "policy statement" was never made very clear and apparently was all but unknown to the persons faced with the question of whether or not to allow interviews.[2] It was apparent from the testimony of a representative from the Marshal's office that the personnel from that office and the jail personnel relied on the "rules of the Rehab Center." As used by the Marshal and the United States Attorney, this term referred not only to the directives of Sheriff Heard, but to the rules and regulations in Exhibit A. In Harris County, the procedure for federal prisoners is roughly as follows.

---

[1] These were apparently not considered relevant to this case by the parties. They read, in part:

> "News media and press members are welcomed into the Harris County Jail and Rehabilitation Center to discuss any problem or question. In the event of an occurrence or event that is felt to be of interest to any member of the news media, they will be contacted and be given the full details. This will be done without favoritism or partiality to certain news media.
>
> * * *
>
> "In the event that an inmate's case or charge becomes of such interest to the public that it becomes necessary for the news media to interview him, all news media will be contacted and allowed to interview the individual simultaneously."

[2] There was never any testimony concerning the procedures followed by Galveston County jail personnel and the rules of the sheriff of Galveston County, if there be any, were not put into evidence.

If, according to the Sheriff's directive entitled "Visitation of Inmates," a person is either an attorney or one of the persons on the list of five persons furnished to the jail by the inmates, then he may visit the inmate as a matter of course. If, however, the person is not on the list or is not an attorney, the Harris County jail officials will determine whether or not to allow the visit or will refer the person requesting a visit to the Federal Marshal's office. The Marshal then refers the question to the United States Attorney, apparently in an attempt to implement Section 4 of Exhibit A which reads as follows:

> "Visits to federal prisoners shall be in accordance with the institution's prescribed rules. The rules should permit visits from identified members of the prisoner's family, his attorney, and, in the case of prisoners awaiting trial, persons with whom he may need to confer to prepare the defense of his case. Institution officials have the right to deny a visit to any prisoner when in their opinion such a visit would not be in the best interest of society or might endanger the security of the institution.
>
> "If in the case of a prisoner awaiting trial or hearing the United States attorney considers that visits or communications from persons other than the prisoner's attorney are against the public interest and so advises the officials, such visits will not be permitted without the written approval of the United States Marshal on each occasion."

The Federal Marshal who testified felt that Section 4 of Exhibit A would govern the situation and preclude visits by the newspapers, but he also indicated that some questions of whether or not to allow interviews might never reach the level of applying Section 4 because the county jail personnel might never call on the Marshal to decide

the question of whether or not to allow or disallow the interview.

The United States Attorney testified that when he received telephone requests to visit inmates in the county facilities he would determine who was requesting the visit and if the person were an attorney, relative, or friend, he would consult the rules of the Rehabilitation Center and "go along" with those. He stated that if the person telephoning desired a press interview, however, he would not allow one if the case were pending because he questioned the undue publicity which might be involved. He stated that he knew of no other rules.

The muddle was partially dissolved by the testimony of a representative of the Bureau of Prisons who stated that Section 4 of Exhibit A had to be interpreted in light of the policy statement numbered 1220.1A which states in paragraph 4(b)(6) that:

> "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

Exceptions to the rules are governed by paragraph 4(c) which provides that they are to be decided by the Director of the Bureau of Prisons. The facts set out above reveal the atmosphere of confusion and misunderstanding which has surrounded this case, especially the hearing held to determine the rules and their source. A situation in which rules in derrogation of first amendment rights are utilized is serious enough, but a situation in which those persons

who are given the authority to administer those rules are unfamiliar with the existence of all of them is as deplorable as it is ludicrous.

The representative from the United States Attorney's office testified that he was guided by "the rules of the Rehab Center." By this we have taken him to mean what was explained by another witness to be the visitation rules of the Sheriff's department interpreted in conjunction with the "Exhibit A" attachment to the contract. Exhibit A, Section 4, gave to the United States Attorney's office unlimited administrative discretion in deciding if a visit to a prisoner would be "against the public interest." A visit against the public interest would not then be allowed "without the written approval of the United States Marshal on each occasion." Presumably the United States Marshal would be following the order of the United States Attorney. Exhibit A further provides that the jail officials have unlimited discretion to deny visits when "in their opinion" a visit would "not be in the best interest of society or might endanger the security of the institution."

The court finds this unconstitutionally invalid on its face even though in the instant case the United States Attorney testified that he was prompted to refuse the interview because in pending criminal cases he always questioned the propriety of "undue publicity." No doubt he was prompted by sincere motives, but he was not being guided by any standards but his own; Section 4 gave him unlimited discretion to do whatever he saw fit. This court is not prepared to agree that the United States Attorney's office is properly charged with such complete discretion in matters so closely touching first amendment freedoms.

The representative from the Bureau of Prisons testified that the administrative discretion was not so far-reaching, because Section 4 was itself limited by the policy statement, paragraph 4(b)(6). That paragraph flatly refused to the press access to federal inmates for face-to-face interviews. In place of administrative discretion there is a far-reaching, emphatic rule, exceptions to which must be made by the Director of the Bureau. This court does not see the policy statement as any improvement, however, because it paints with too broad a brush. The Bureau of prisons does not have to forbid all interviews in order to protect the interests which it seeks to protect.

The whole atmosphere of this area, at least as it exists in Harris County, is so pervaded with confusion as to what the rules are exactly and who is to administer them that the court cannot countenance such a situation even though all action may have been taken with the best of intentions and in an effort to implement Rule 3 of the Local Rules of Civil Procedure. It is simply too easy, in the atmosphere which now exists, to abuse the first amendment in the name of Rule 3 or jail administration. The court does not mean to imply, however, that both Rule 3 and jail administration are not extremely important considerations.

Since the court finds that the language of the policy statement and the language of the contract make both facially unconstitutional, we will not delve any deeper into the application of the "rules" in this case.

Initially the defendants advocated the continuing enforcement of the restriction as a method of following Rule 3 of the Local Rules of Procedure for the Southern District of Texas. This rule is designed to prevent the trying of a

case in a circus-like atmosphere, by forbidding lawyers to give out certain information about their pending cases to the press.

Since the hearing held on the merits, however, the defense has presented at the court's request additional theories of compelling state interest. The defendants contend that media persuasion could easily force unwilling inmates to grant interviews, especially since the inmates would be without the protection of his attorney while being "persuaded." The defendants further assert that information received under such conditions could degrade the prisoner and his family, give certain prisoners undue prominence, and compromise the prisoner's safety. Finally, the defense points out that the very fact of the inmate's imprisonment impairs his ability to discontinue an interview once the press has persuaded him to grant one.

This court has examined in turn each of the theories advanced as justification for the rule. The court finds that the interest defendant seeks to protect by enforcing the rule barring interviews can be protected by a less drastic restriction on the first amendment rights of plaintiff and those whom it represents.

1. Standing

The Government has questioned the Chronicle's standing to assert its own first amendment rights and those of the prisoners in the Galveston County and Harris County jails.

Both plaintiff and defendant place much emphasis on the existence of the letter Mirelez sent to his sister requesting an interview. The Chronicle uses it to bolster

its case for standing; the defendant attempts to discredit its validity in an attempt to defeat the Chronicle's standing.

The court has heard testimony that many inmates, when approached by a newspaper, will voluntarily grant interviews. Faced many times, as this court has been, with the desires of prisoners to freely voice their complaints, the court is compelled to believe this testimony. Because many inmates will freely grant interviews, the fact that two individuals who have been approached or who have approached the Chronicle do not now wish to be interviewed, is not controlling in this case in which the Chronicle has been denied access to *all* prisoners.

In this case the evidence shows that there is a rule which prohibits any newsman from interviewing any prisoner in federal custody; the Chronicle has been prohibited from interviewing any federal prisoner in the Harris County and Galveston County jails as a result of this rule; and that the Chronicle would be prohibited from conducting such interviews in the future.

Given this set of facts, the court concludes that the Chronicle falls within the test set out by the Supreme Court in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 152-153, 25 L.Ed 2d 184, 187-188 (1970): "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact. . . ." Here the Chronicle, a newspaper, is being prevented from gathering the news, an activity vital to its very existence. Further, the Court said:

> "The questions of standing . . . concerns, apart from the 'case' or 'controversy' test, the question whether

> the interest sought to be protected by the complainant is arguably within the one of interests to be protected or regulated by the statute or constitutional guarantee in question."

Certainly the first amendment as it has been interpreted was designed to protect the endeavors of newspapers. The Court finds the Chronicle has standing to challenge the constitutionality of the rule barring interviews; and because it has shown past refusals and the possibility of future refusals, the Chronicle has standing even if it cannot show that any specific prisoner would be interviewed upon the granting of the requested injunction. Only if the Government had shown that there was no opportunity for interviews with prisoners because none desired to be interviewed could they defeat the Chronicle's standing, especially in light of the fact that the rules make it difficult for the Chronicle to even request an interview.[3]

Closely related to its assertion of its own rights is the Chronicle's assertion of the rights of the prisoners in the two jails. The prisoners have not been joined to this action as parties plaintiff, but the Chronicle contends that it may assert their rights here because of the fact that the two rights to interview and to be interviewed are so directly and basically interrelated. If the prison can forbid the prisoners to give interviews, then any victory of the Chronicle here would be meaningless.

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[3] There is some question about the freedom with which inmates may correspond with the press. The Policy Statement numbered 1220.1A dated February 11, 1972, indicates that prisoners are to be allowed to correspond freely with the press; the undated directive from Sheriff Heard, titled "Mail Privileges, Harris County Detention Facilities" allows unrestricted correspondence; Mr. Mirelez' letter, however, indicates that, although he is allowed to correspond with persons not on his mailing list, he cannot receive mail from those not on the list.

The Government cites us to the cases of *Tillston v. Ullman,* 318 U.S. 44, 87 L.Ed 603 (1943), and *Palmer v. Thompson,* 391 F.2d 324 (5th Cir. 1967). These cases are not in point, however, because they are concerned with a situation in which the party plaintiff is himself either uninjured by the State's action or unprotected by the particular right asserted. It seeks to assert the rights of third parties who are not injured. The Chronicle case is, however, much closer to *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed 1070 (1924) in which a private school whose existence was threatened by a state statute was allowed to challenge the constitutionality of the statute on its own behalf and on the behalf of its students and their parents. In that case and this we have a situation in which the party plaintiff has a very real injury and a clear constitutional right on which to sue, but the right is closely tied to the rights of individuals not party to the suit, who will be affected by the outcome of the suit.

In *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed 2d 510, the court cited a number of cases, including *Pierce,* in which closely related rights of third parties were properly asserted in support of a plaintiff's challenge to unconstitutional statutes or actions. Because, "the rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them [doctor-patient], the court in *Griswold* found that the doctor could properly assert his patients' rights. The instant case fits into *Griswold* and *Pierce* exceptions to the general rule that rights of third persons not parties to the suit are not properly asserted by the parties to a suit.

The Chronicle has standing to assert the rights of the prisoners in the Harris County and Galveston County jails to be interviewed. The Chronicle also has the standing to challenge the directives on the public's behalf. The rights of the public to know are so closely tied to the rights of the Chronicle and the rights of the prisoners that the Chronicle can assert those rights under the *Griswold* and *Pierce* cases.

II. Rights of the Chronicle

The Chronicle's right to seek out news is a part of its first amendment right to publish news. The Supreme Court has left little doubt of this fact:

> "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665 (1972).

The court in *Branzburg* went on to find that society's need for a properly functioning grand jury system weighed heavier in the balance than the "consequential but uncertain burden on newsgathering." The outcome of the *Branzburg* case, however, does not indicate, as the Government suggests, that newsgathering is not a substantial part of the publication process so jealously protected by the first amendment, interpreted by the Supreme Court in numerous decisions, including *New York Times v. U.S.*, 403 U.S. 713 (1971), *Bridges v. California*, 314 U.S. 252 (1941), and *Bantum Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The Government makes much of the fact that, as *Branzburg* says:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

The instant case is not concerned, however, with information "not available to the public generally." *Branzburg* gave as examples situations in which it was necessary or proper to maintain secrecy, *i.e.*, grand jury proceedings, Supreme Court proceedings, meetings of official bodies gathered in executive session, the meetings of private organizations, or situations in which there was some overriding governmental reasons for restricting the activities of private persons. It goes without saying that the general public is not allowed into jails; the security problems are obvious. But that fact does not compel the conclusion that the press should be categorically excluded from the jail, for the simple reason that certain members of the general public, to wit, friends, family, and attorneys, are for good reason allowed into jails for the purpose of seeing the inmates face-to-face. In the absence of a compelling State reason why the press should be excluded, the first amendment is good enough reason to allow the press into jails.

This court holds that the press has a first amendment right to gather information from jail inmates assuming those inmates desire to be interviewed.

III. *Rights of the Prisoners*

The Chronicle asserts for the prisoners incarcerated by the Federal Government in the jails of Harris and Galveston counties, the rights of those prisoners to free speech as guaranteed by the first amendment. Incarceration in any penal institution, be it prison or jail, necessarily re-

sults in the deprivation of certain constitutionally guaranteed rights, but the notion that the rights of prisoners can be trampled upon as the incarcerator sees fit has long since given way to the truism that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945). The language of the Fifth Circuit in *Walker v. Beachwell*, 411 F.2d 23, 24 (1969) suggests the general survival of the first amendment rights, whether of religion or speech:

> "There is no doubt that the courts will scrutinize administrative action involving the constitutional claim of prisoners . . . who . . . claim a deprivation of the 'preferred' freedom of the First Amendment."

The assertion of first amendment rights is especially poignant in the case of persons incarcerated in pretrial confinement who have not been convicted of any crime and, but for the lack of funds, would be able to give any interview they chose.

In a case concerning the sending of letters to the news media, the First Circuit, through Judge Coffin, expressed a sentiment which this court has previously adopted [*cf. Guajardo v. Beto*, 349 F.Supp. 211 (S.D. Tex. 1972)].

> "We need not adopt the broad principle that a prisoner retains all First Amendment rights to conclude, as we do, that he retains the right to send letters to the press concerning prison matters. In so concluding, we rely primarily on the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the

> right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear. This does not depend upon a determination that wardens are unsympathetic to the need to improve prison conditions. But even a warden who pushes aggressively for reforms or larger appropriations within his department and before appropriate officials and legislative committees may understandably not feel it prudent to push for more public laundering of institutional linen." *Nolan v. Fitzpatrick*, 421 F.2d 545, 547-548 (1st Cir. 1971).

The difference between the face-to-face interview of a willing prisoner and correspondence by a prisoner with the press is significant only with regard to the administrative tasks of those in charge of the prisoners. The rights of expression involved are identical.

IV. *Public Right to Know*

Closely tied to the rights of both prisoner and press is the right of the public to know, as Judge Coffin indicated, *supra*.

Justice Black in *New York Times v. U.S.*, 403 U.S. 713 (1971), gave a lucid exposition of the interconnection between the public's right to know, the freedom of the press, and the necessity for both.

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governor. The Government's power to censor the press was abolished so that it could bare the secrets of government and inform the people."

The Supreme Court has very recently restated the fact of the right of the public to know in *Kleindienst v. Mandel*, ____ U.S. ____, 33 L.Ed 2d 683 (1972): "It is now well established that the Constitution protects the right to receive information and ideas."

Especially in these times of jail and prison turmoil and unrest, it becomes even more important to see the interrelationships between the press' right to gather information, the prisoner's right to express himself, and the public's right to know, on the one hand, and the creative thought behind the guarantees of freedom promulgated in the Bill of Rights.

V. *Rule 3 of the Local Rules*

Having come to the conclusion that the rights of the press, the prisoner, and the public have been burdened by the rule which forbids interviews of federal prisoners incarcerated in the jails of Harris and Galveston counties, we now come to the Government's contention that this burdening is only incidental to a valid purpose, unrelated to the free-speech aspects of the case. The Government has relied, *inter alia*, on the position that the rule is an attempt to implement Rule 3 of the Local Rules of the Southern District. Rule 3 reads in pertinent part:

> "Rule 3. Release of Information by Attorneys.
>
> "A. *In Criminal Cases.* It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

"B. *In Grand Jury Proceedings.* With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

"C. *After Arrest and Before Trial.* From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime) or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or faliure of the accused to make any statement;

"(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

"(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

"The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or test of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

"D. *During Trial.* During the trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the lawyer or law firm may quote from or refer without comment to public records of the court in the case.

"E. *After Trial, Before Sentencing.* After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

"F. *Special Circumstances.* Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him."

The Government reasons that, since the Attorney General is an attorney, he is bound by Rule 3, and it is therefore his duty to keep prisoners under his care away from the occasion to place him in violation of Rule 3. It is true that prisoners have a right to a trial free from a circus-like atmosphere. The Government has cited us to several cases which hold that in certain special circumstances the right to free access to news sources may be curtailed in the interests of a fair and decorous trial.

Many courts, state and federal, have issued standing orders forbidding photographers at or near a trial. In varying contexts these rules have been challenged by photographers or their newspapers and have been, for the most part, upheld. *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958), *Seymour v. U.S.*, 373 F.2d 629 (5th Cir. 1967), *Dorman v. Meiszner*, 430 F.2d

558 (7th Cir. 1970). The *Dorfman* case, *supra,* did not question the propriety of such a rule, but struck down the rule for its overbreadth. Indeed, since the cases of *Sheppard v. Maxwell,* 384 U.S. 333 (1966) and *Estes v. Texas,* 381 U.S. 532 (1965), there can be little question that the prevention of a circus-like atmosphere at trial is not only proper but necessary. It is a court's duty to do everything in its power to keep extraneous forces from prejudicing the rights of the parties to the lawsuit. A rule against photographers in and around a courtroom is, however, a far cry from the blanket prohibition against all interviews which concerns us in the instant case. Rule 3 is a closely drawn, specifically worded rule. It does not speak to the question of whether or not an attorney can voice his opinion on jail conditions to newspaper reporters, yet the rule which bars all interviews does forbid this to the prisoners, who cannot speak out on jail conditions or, indeed, any subject at all.

The Government argues that there are four classes of prisoners:

(1) Pretrial confinement:

(2) Posttrial confinement:

(a) Conviction final;

(b) Conviction not final;

(3) Witness held in protective custody.

The two prisoners whom the Chronicle sought initially to interview fall respectively into categories (1) and (3), both categories being within the scope of Rule 3. The presentation of Government's case does not obscure the fact, however, that Rule 3 does not forbid to prisoners all

interviews on all subjects, but the Attorney General, through its agency the Bureau of Prisons, does.

This court finds it extremely difficult to see how such an all-prevailing prohibition against prisoner interviews could be derived from the narrowly-constructed, carefully-drawn language of Rule 3. The rule forbidding all interviews on all subjects go beyond the restriction contemplated by Rule 3.

VII. *Other Reasons*

The Government contends further that the rule barring interviews is designed to protect the inmates from the press which might, if not restricted, compel him to grant an interview against his own interest and publish articles demeaning to a prisoner or his family.

This court finds it difficult to see how a person's incarceration has any bearing whatsoever on his ability to grant an interview or refuse one. Certainly, the valid restrictions placed on communication with persons in jail should decrease rather than increase the likelihood that the prison inmate will be compelled to grant an interview. The fact that a person is incarcerated does not lead to the conclusion that he has lost the ability to realize when the interview would be in his or his family's best interest and when it would not.

An official of the Bureau of Prisons testified that there were still other reasons, administrative in nature, why face-to-face interviews should not be allowed. In the first place, he contended, personal interviews give undue prominence to certain inmates and create an atmosphere not conducive

to rehabilitation. While this argument might be persuasive in a case involving interviews in prison, it is out of place in a jail situation. Jails are not places of rehabilitation. Rather, they are places of temporary detention. The jail, unlike the prison, is in a constant state of flux. The inmate notorious one day is not so notorious the next simply because the fluid population has changed.

In a later portion of his testimony the prison official asserted that the confinement facilities of the Harris County and Galveston County jails are primarily temporary retention areas for federal prisoners. For that reason there is little or no opportunity to screen violent or dangerous inmates from those who are not violent or dangerous. Personal interviews, the expert felt, would, possibly, compromise the security of the institution and the safety of the members of the press. The court is not impressed by this argument. Members of the press are a notoriously brave breed. As for the safety of the institution, it is no more threatened by a press interview than it is by a visit from the inmate's family, friend, or lawyer. There has been no showing that the facilities of Harris or Galveston counties are particularly susceptible to breaches of security or conducive to dangerous unrest.

This court can see no compelling reason why the inmates of the Harris County and Galveston County jails, 65% of whom the Government's expert testified have not been convicted of the crime with which they are charged, should be restricted from face-to-face confrontation with the press, if they want it.

The Government takes the position that face-to-face interviews are but one means of obtaining news. It analo-

gizes their newsgathering technique with the sound truck and quotes *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949), implying that both face-to-face interviews and sound trucks are public nuisances. This court is asked by the Government to consider the necessity of face-to-face interviews in light of the alternative methods available to both press and prisoner. The federal prisons have a policy of allowing the press to visit the prisons and correspond with inmates. The inmates are permitted to visit with other people—family, friends, lawyers—and to correspond with judges and congressmen.

The Chronicle, however, presented testimony strongly persuasive to a conclusion that the face-to-face interview is not just another method of communication. Two experienced newsmen and two university journalism professors testified that it is basic and essential to newsgathering in many contexts. Newsmen, like lawyers and judges, need to size up those from whom they receive information and the face-to-face interview is the most important technique of doing so. The court is compelled to believe the Chronicle's experts on the question of the necessity of face-to-face interview.

VIII. *Conclusion*

When all is said and done, what remains is a case of prior restriction on the press' right to publish, the prisoner's right to speak out, and the public's right to know. The Supreme Court has said in *Bantum Books v. Sullivan*, 372 U.S. 58, 70 (1963): "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its Constitutional validity." Had the rule for-

bidding interviews fallen more in line with the letter and the spirit of Rule 3, there is little doubt that this court would have upheld those directives since the rights of a prisoner to a fair and decorous trial has always outweighed the incidental burden on newsgathering it might cause. *Cf. Estes, Sheppard, Tribune, Seymour,* and *Dorfman,* all cited above.

Had the rules been closely drawn to protect the inmate from his own lack of discretion, he jailers from an undue burden of administration, or the jails and the press from threats to security or safety, this court would almost certainly have upheld them, since the Fifth Circuit has held that internal prison management is not ordinarily a function of the courts. *Cf. Gardner v. Joyce* [slip opinion No. 73-1452, July 25, 1973] and cases cited therein.

Given, however, the breadth and far-reaching effect of the policy statement of the Bureau of Prisons as well as the unbridled discretion in this area granted to the United States Attorney's office and to the jail officials by virtue of paragraph 4 of Exhibit A attached to the contracts relating to federal use of the Harris County and Galveston County jails, this court is compelled to strike down these rules as unconstitutional. The Supreme Court has spoken time and time again to the necessity for precise regulation in the first amendment area: "It has become axiomatic that '[p]recision of regulation must be the touchstone in the area so closely touching our most precious freedoms.'" *U.S. v. Robel,* 389 U.S. 258, 265 (1967). And again, most recently in *Police Dept. v. Mosley,* ____ U.S. ____, 92 S.Ct. ____, 33 L.Ed 2d 212, 220 (1972): "Statutes affecting First

Amendment interests [must] be narrowly tailored to their legitimate objectives." Judge Tuttle speaking for the Fifth Circuit has expressed the proposition in this way:

> ". . . [in the area of first amendment freedoms] we have pointed out that stringent standards are to be applied to governmental restrictions . . . and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement . . .; and in the absence of such compelling justification the State restrictions are impermissible infringements of these fundamental and preferred rights.
>
> "Moreover, in examining the justification for state infringement [in the area of first amendment freedoms] . . . the Supreme Court has recognized and declared the principle that the means utilized by the State, as well as the ends, must be legitimate. Even the most legitimate of legislative ends cannot justify the enforcement of fundamental rights of individual citizens if these ends may be accomplished by the use of less restrictive alternative means which result in less invasion of these fundamental rights." *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968).

This court does not see how these vague and overbroad rules which flaunt first amendment freedoms and constitute a prior restraint could possibly be justified by legitimate, overriding governmental objectives which could not be produced by narrow and precisely drawn directives.

The Seventh Circuit has admirably summed up this court's opinion in a case involving photographs in the courthouse:

> "Our disagreement with the Government's argument is not that a court is powerless to protect the participants and proceedings from immediate harassment from the press but that Rule 34, which seeks to accomplish that concededly legitimate goal, is overbroad and, in effect, prohibits conduct which does not threaten to disrupt judicial process, as well as that which does." *Dorfman v. Meizher*, 430 F.2d 558, 562 (7th Cir. 1970).

Accordingly, this court declares those parts of the policy statement of the Bureau of Prisons and Exhibit A attached to the contracts between the Bureau of Prisons and Harris County and Galveston County which forbid all face-to-face interviews with federal inmates in the jails of those counties constitutionally invalid and void. The court further enjoins all defendants herein, together with their agents and deputies, from further enforcing such rules. The court feels that unlicensed access to the jails would be both prejudicial to the inmates and administratively unfeasible and, therefore, encourages the promulgation of new rules and regulations consistent with this court's opinion and final judgment. Any such new rules and regulations should also be compatible with the letter and spirit of Rule 3 of the Local Rules of the Southern District of Texas.

DONE at Houston, Texas, on this the 24th day of August, 1973.

JOHN V. SINGLETON,
United States District Judge.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS,
Appellants,

vs.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move the Court to dismiss the above docketed appeal or, in the alternative, to affirm the order of the United States District Court for the Northern District of California which rejected appellants' claim that the practice of allowing the press to interview prison inmates selected at random violated appellants' constitutional rights,

as it is manifest that the questions raised by appellants are so unsubstantial as not to need further argument.

STATE PROVISION INVOLVED

California Department of Corrections Manual Section 415.071:

> "Press and other media interviews with specific individual inmates will not be permitted."

STATEMENT OF THE CASE

On November 8, 1971, Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that appellees Procunier, Nelson, and Parks were denying him an interview with the editors of Earth Magazine. A single-judge district court issued an order to show cause, and on January 13, 1972, appellees filed a return. Upon hearing on the order to show cause, counsel was appointed for Hillery.

On March 8, 1972, a first amended complaint for damages and declaratory and injunctive relief was filed. The amended complaint added as plaintiffs the appellants Eve Pell, Betty Segal, and Paul Jacobs, and three inmates, John Larry Spain, Bobby Bly and Michael Shane Guile, and added as a defendant appellee Joseph O'Brien. The new pleading alleged the original claim of Hillery, and further alleged that appellant Pell was a free-lance author who had been denied a requested interview with Spain, that appel-

lant Segal was a newspaper reporter whose request to interview Bly was disapproved, and that appellant Jacobs was a television reporter who had unsuccessfully sought permission to interview Guile.

The amended complaint sought "to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel." The amended complaint averred that as a result of the limits on such visits "the media have gained access only to that information which the prison administration decides to reveal, creating a serious infringement upon the public's right of access, through the press, to information about the prison. Such infringement is especially serious in this case, since the public is unable to obtain this information on its own."

On April 6, 1972, appellees moved to dismiss the amended complaint on the ground that it failed to state a claim upon which relief might be granted, pursuant to Federal Rule of Civil Procedure 12(b), and on the ground it failed to raise a substantial federal question. On April 10, 1972, appellee Nelson's answers to interrogatories propounded by Hillery were filed. In response to interrogatory number 3, requesting the rules and regulations regarding interviews between the media and specific inmates, appellee Nelson quoted California Department of Corrections Manual section 415.071, and appended San Quentin Institution Order No. 300 (a copy of said order is attached hereto as Appendix A). In clarifi-

cation of his responses, appellee Nelson noted "that media persons are permitted to enter the institution and interview inmates whom they happen to encounter, and who are willing to be interviewed. If a media representative desires to interview a condemned man, the selection of the inmate to be interviewed is made at random from among those inmates willing to be interviewed. If more than one condemned inmate is sought to be interviewed, the interviewer is obliged to pay the escort charges for the second and each subsequent inmate interviewed." San Quentin Institution Order No. 300 details a comprehensive plan for disseminating information to the public. (Appendix A). In particular, it designates the officer who is to arrange interviews between the media and inmates (III. B. No. 4) and sets forth the procedures to be employed in such interviews (IV. E.). In response to interrogatory number 13, asking for the rules regarding visiting privileges, appellee Nelson appended the current visiting rules (a copy of the rules is attached hereto as Appendix B). The visiting rules make it clear that a member of the general public has no right to a visit with a specifically designated inmate.

On September 29, 1972, following the submission of further points and authorities by the respective parties, the single-judge district court issued an opinion and order. The court found that section 415.071 did not violate any First Amendment rights of appellants. The court further found that interviews under the random selection method did not violate equal protection of the law. The court found, how-

ever, that section 415.071 was an unconstitutional regulation of inmates' rights of free speech, and, hence, the court concluded that the plaintiff-inmates were entitled to an order enjoining the enforcement of section 415.071. Accordingly, the order of the court declared section 415.071 invalid as a violation of the First Amendment, permanently enjoined the enforcement thereof, and directed appellees to submit a proposed new rule consistent with the opinion.

On October 4, 1972, appellees filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and appellants did not oppose the motion. On November 1, 1972, the September 29 opinion and order were set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.[1]

On February 14, 1973, the American Civil Liberties Union, *amicus curiae*, filed a memorandum on behalf of six members of the press. On February 23, 1973, appellees filed a memorandum in response, and attached thereto the transcript of appellee Procunier's testimony in *Washington Post Co. v. Kleindienst*, 357 F.Supp. 770, 779 (D.D.C. 1972). In the course of his testimony, appellee Procunier explained how interviews were conducted under the random selection method (the pertinent portion of the transcript is

[1]Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were approved by the single-judge court on February 8, 1973. On November 14, 1973, the three-judge court allowed the same interim procedures to remain in effect pending further order of the court.

attached hereto as Appendix C). The matter was heard before the three-judge district court on February 24, 1973, and the matter was submitted.

The opinion of August 16, 1973, sets forth the facts about which there is no significant dispute. The court found that the Department's regulation did not in practice prohibit all interviews, but allowed media representatives to enter the prison and conduct random interviews in which inmates so selected could express themselves personally. The court further recognized that the Department's regulation did not constitute a prior restraint or restriction on what the press might publish nor did it constitute an express or implied command that the press publish that which it preferred to withhold.

On the issue of the news media's alleged right to selective interviews, as distinguished from the inmates' alleged right, the district court stated:

> "The media plaintiffs herein and amicus curiae (footnote omitted) argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees. It has been made clear in recent decisions by the Supreme Court that the press enjoys no greater right to access to news sources than the average citizen. In *Branzburg v. Hayes,* 408 U.S. 665 (1971) the Court held that newsmen were not immune to grand jury solicitation of or information derived from the newsmen's confidential sources. While the facts of that case are substantially different than those presented here, the Court unequivocally dismissed any notion that the First Amendment bestowed upon news-

men special news-gathering privileges. Reviewing past decisions on the subject (footnote omitted) the Court observed: 'It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.' 408 U.S. at 684. As in *Branzburg,* the present case '. . . involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withold.' 408 U.S. at 681.

"This rationale was followed by the Ninth Circuit in the recent decision in *Seattle-Tacoma Newspaper Guild, Local No. 82 v. Parker,* [480 F.2d 1062 (1973)]. In that case media plaintiffs and prisoner intervenors challenged a regulation implemented at McNeil Island Federal Penitentiary which prohibited press interviews with willing prisoners. With respect to the First Amendment claims of the media representatives, the court held that under *Zemel v. Rusk, supra,* the '". . . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information"' [480 F.2d at 1067], and that the 'disruptive influences' at McNeil 'outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews.' [480 F.2d at 1066].

"The *Seattle-Tacoma* ruling with respect to the media claims controls here. We note in passing, however, that cases cited by plaintiffs emanating from other jurisdictions apparently arriving at an opposite conclusion are distinguishable. In *Washington Post v. Kleindienst,* [357 F.Supp. 770

(D.D.C. 1972)] (footnote omitted) for example, the regulation held unconstitutional barred *all* interviews with inmates at federal penitentiaries in Connecticut and Pennsylvania. The court held that '[a] continuing flat [prohibition] against press interviews of any prisoner, at any time, in any institution, [under any circumstance,] is on its face arbitrary.' [357 F.Supp. at 773]. In that context, it is apparent the press was not being granted a *special* right of access to prisoners, but simply *some* access. Even under § 415.071 as it stood before today's ruling the press was given the freedom to enter the California institutions and interview at random, and it is the conclusion of this court that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates."

Accordingly, the court granted appellees' motion for dismissal as against appellants.[2]

ARGUMENT

THE QUESTIONS RAISED BY APPELLANTS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. The result reached by the District Court is consistent with the decisions of this Court.

As is recognized by appellants, "[t]he opinion of August 16, 1973, sets forth the facts about which

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[2]The district court concluded, however, that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. The court found section 415.071 unconstitutional insofar as it infringed the inmates' rights and granted summary judgment in favor of the inmate-plaintiffs. This portion of the court's order is being appealed in *Procunier v. Hillery*, No. 73-754, October Term 1973.

there is no significant dispute." (Jurisdictional Statement at page 5). The district court found that "[t]he regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population (Footnote omitted). Thus, media representatives are able to interview an inmate, but unable to select a particular inmate." (*See also* Appendix A and C). A member of the general public has no absolute right to visit a specifically designated inmate. (*See* Appendix B). The district court further recognized that the Department's regulation did not constitute a prior restraint or restriction on what the press might publish nor did it constitute an express or implied command that the press publish that which it preferred to withhold. (*See also* Appendix A and C). Given these facts, it is readily apparent that the order of the district court granting appellees' motion to dismiss as to appellants is consistent with the decisions of this Court.

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. (Citations omitted)" *Branzburg v. Hayes,* 408 U.S. 665, 684 (1971). "The right to speak in public does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 17 (1964).

The Department of Corrections' rule does not restrict the right of the press to publish and circulate

prison news. *Compare, New York Times Co. v. United States,* 403 U.S. 713 (1971) [injunction against publication of classified material]; *Time, Inc. v. Hill,* 385 U.S. 374 (1967) [damage award on publication of crime story]; *Near v. Minnesota,* 283 U.S. 697 (1931) [statute against publication of defamatory matters]. It is not a form of registration or licensing. *Compare, Lamont v. Postmaster General,* 381 U.S. 301 (1965). The First Amendment does not protect the press in their mercenary activities and a notion that the press has some higher First Amendment right than has the public generally has been repeatedly denied. *See Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969); *Associated Press v. United States,* 326 U.S. 1 (1944). The Department's regulation does not deny the press a right of access which the Department affords to the general public, as the general public is not afforded an absolute right to visit a specifically designated inmate. *See Zemel, supra,* 381 U.S. at 16-17.

B. The result reached by the district court is not in conflict with the decisions of other lower federal courts.

Appellants assertion that the order of the district court conflicts with other decided cases which have condemned a general and absolute bar on personal interviews between the media and inmates is a *non sequitur,* as the district court found that "[t]he regulation does not effect an absolute ban on all media interviews with inmates."

Moreover, appellants assertion that almost all the decided cases have condemned prohibitions on such

interviews is not accurate. While absolute prohibitions were invalidated in *Houston Chronicle Pub. Co. v. Kleindienst,* ..... F.Supp. ....., No. 72-H-1657, S.D. Tex., August 24, 1973, and in *Washington Post Co. v. Kleindienst,* 357 F.Supp. 770, 779 (D.D.C. 1972), *appeal pending,*[3] such prohibitions were upheld in *Mitford v. Pickett,* 363 F.Supp. 975 (E.D. Ill. 1973); *Smith v. Bounds,* ..... F.Supp. ....., Civ. 2914 (E.D. N. Car. March 14, 1972) and *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062 (9th Cir. 1973).

In disposing of the contention that there is an absolute right to gather news, the Ninth Circuit observed:

> "We are acutely aware of the public's need for information in this area. However, we do not accept the argument that the public interest in having its prisons secure and free from disruptive influences and in the rehabilitation of prisoners is insufficient to outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews.
>
> "We have already noted that the regulation in question is rationally related to the achievement of legitimate goals of prison administration. Appellant Newspapers Guild argues that despite the wide discretion allowed administrators in the formulation of rules and regulations governing prisons, there is nonetheless an absolute right to gather news, citing *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972):

---

[3]Appellants' suggestion that the facts in *Washington Post Co.* are similar to the facts of this case is belied by the repeated characterization of the policy in question as a flat prohibition on interviews. *Washington Post Co., supra,* 357 F.Supp. at 773, 774, 775.

"We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for the First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.' At 681, 92 S.Ct. at 2656.

"However, '. . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information.' *Zemel v. Rusk,* 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965), and accordingly the issue we must decide is whether the interview ban unduly restricts the flow of information to the public. In concluding that it does not (footnote omitted) we again call attention to the Bureau's regulations giving news media extensive access to prison facilities and personnel, as well as the right to unlimited confidential correspondence with inmates. We are convinced that any hampering of the ability of the media to report occasioned by the interview ban is more than justified by the persuasive reasons given for its formulation." *Seattle-Tacoma Newspaper Guild, supra,* 480 F.2d at 1066-67.

The other cases cited by appellants are not on point. In *Burnham v. Oswald,* 342 F.Supp. 880, 884 (W.D.N.Y. 1972), the court was not called upon to judge the validity of a flat prohibition against interviews, but rather was asked to rule on the adequacy of guidelines which afforded a limited right for interviews. In *Mimms v. Philadelphia Newspapers, Inc.,* 352 F.Supp. 862 (E.D. Penn. 1972), the issue before the court was not the validity of a flat prohibition on interviews, but rather whether a complaint filed by

an inmate which in effect alleged a cause of action for libel and invasion of privacy stated a cause of action under the federal civil rights acts.

CONCLUSION

For the reasons stated above, the appeal should be dismissed or in the alternative, the order of the district court respecting the alleged rights of the news media should be affirmed as the questions raised by appellants are so unsubstantial as not to need further argument.

Dated, January 3, 1974.

Respectfully submitted,

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(Appendices Follow)

Appendix A

CALIFORNIA STATE PRISON
SAN QUENTIN

Institution Order No. 300

Subject: *San Quentin Public Information and Community Relations Plan*

References: Director's Rules, Chapter IV, Article I and Sections 415, 420, 421 and 422 of the Departmental Administration Manual.

General Policy: Employees must conform to all provisions of the Director's rules and of the Departmental Administrative Manual in carrying out this plan.

I. *Definitions:*

A. *Public Information* is all information supplied to the public in recognition of their right to be informed about the operations, problems, programs and goals of San Quentin and of the Department of Corrections. The term "public" includes both the broad audience reached by news media and a large group of special "publics" such as employees, inmates, business men, union members, educators, service clubs, law enforcement agencies, etc., each of whom have

particular interests in various aspects of San Quentin's program.

B. *Community Relations* is the constructive integration of San Quentin and its employees into the life of both the adjacent communities and the broader community of citizens whose interests are served by the institution and its activities. Community understanding of program objectives and their acceptance of program methods are vital to good community relations. Each employee by his works and actions has an important effect upon community understanding and acceptance of San Quentin.

II. *Objectives of the Public Information and Community Relations Program:*

A. To provide factual, unbiased information about unusual events occurring in the institution.

B. To provide balanced, objective information about the less spectacular but vital elements of the ongoing San Quentin program.

C. To elicit public understanding of and participation in the institutional program.

D. To inform the public about San Quentin Service to society in the prevention of crime through incarceration and re-socialization of offenders.

E. To educate each employee to his responsibilities for the presentation of an accurate and well-balanced picture of the institution.

III. *Organization of Public Information:*

A. The Warden of San Quentin approves and releases all public information, either personally or through specifically designated staff.

B. *The Information Officer:*

1. Releases spot news and answers press inquiries during the regular work day, informs the Warden of releases made, and consults with the Warden prior to releasing news of major occurrences.
2. Coordinates the public information program, clearing press releases developed by other staff members, and providing technical assistance to staff in developing news features.
3. Develops press releases concerning special events and on-going programs.
4. Arranges for special press interviews with staff and inmates, filming of events, etc.
5. Provides technical guidance and gives assignments to the inmate press office, with the cooperation of the Supervisor of Education.

C. *The Officer of the Day:*

1. Releases spot news and answers press inquiries during other than regular working hours.
2. Checks daily with the Warden's Office regarding possibly press inquiries and special events.

D. *Division Heads:*

1. Are responsible for the development of informative news releases concerning their areas of operation. Either complete releases or compilations of information that can be built into a release are routed to the Information officer for clearance.
2. Through staff training create an appreciation of the value of constructive news releases, and encourage their staff to develop same.
3. Are responsible to see that any unusual occurrences, acts of heroism, efforts beyond the call of duty, extraordinary achievement, etc., are referred promptly to the Information Officer for possible press release.

IV. *Policies and Procedures in the Administration of Public Information:*

A. Release of News:

1. Release of spot news by authorized personnel is made to the three newspapers maintaining regular reporters in Marin County. One call to the Marin Press Release Service will reach these papers:

The San Rafael Independent Journal
The San Francisco Examiner
The San Francisco Chronicle
United Press International
Associated Press

2. Release of feature news is made to these three papers, and to other newspapers, wire services, radio and television stations as may be desirable. Feature news releases will be approved by the Warden's Office in every instance.

B. Press contacts by employees on institutional matters is limited to authorized staff or when express permission is granted.

C. Inquiries re development of feature articles by freelance writers, magazines, press services, etc., will always be referred to the Warden's Office for review and referral for Central Office approval when necessary.

D. Interviews of employees by the press and appearance on television or radio must re-

ceive prior approval from the Warden's Office. Involvement in controversial subjects will be such that it is clear that the employee is not speaking for the institution, unless authorized to do so.

E. Interviews of inmates by news media:

1. Will be cleared through the Information Officer who will consult with the Warden in controversial or notorious cases.

Rev. 2. Require the consent of the inmate on the CDC 146. Photographing of inmates will require similar approval, although ID shots can be given upon request and without consent since they are a public record.

Rev. 3. Requires supervision appropriate to the type of case. Interviews with men on maximum custody, isolation or administrative segregation will be permitted only if no undue security hazard is present.

4. Interviews with condemned men will always be processed through the Associate Warden, Administration, and the detailed provisions of AM 415 will be followed.

Rev. 5. Inmates awaiting trial will not be interviewed until the trial is concluded.

F. Supervision of television or motion picture crews will be arranged by the Information Officer, as follows:

1. Short news and features: by the Information Officer or by custodial personnel. If the short features involves a particular area, staff from that division may be asked to supervise.
2. For filming sequences, filming agency may be asked to pay for custodial supervision.

V. *Guidelines for Dealing With News Media:*

A. The policy of San Quentin is to give the reporters all reasonable assistance in developing a story, since this aids in the mutual task of informing the public.

B. Answer all inquiries briefly, factually and objectively, without bias, personal opinions or dramatic effects. Answers should be confined to established policy and official information. Personal opinion, especially in controversial matters, should not be released as news. Evaluate statements issued as to the impression they will create if printed out of context and without explanation. Do not issue facetious, cynical or humorous statements, nor use prison jargon or slang.

C. Information released regarding inmates should be limited to objective statements in answer to specific questions from the official record: i.e., age, offense, legal status, assignment, number of disciplinary infractions, etc., privileged information such as psychiatric diagnosis, details from social or other diagnostic interviews, personal attitudes to family, etc., will not be released.

D. Never volunteer "exclusive" stories to one reporter. If a reporter, through his own initiative, develops an exclusive story or information, this "exclusive" should be honored and other reporters should not be told of this. The activities of one reporter must not be told to others.

VI. *Administration of Community Relations Program:*

A. All employees are responsible to convey objective, realistic information about San Quentin to the public on the job, in community groups and in private contacts.

B. All formal community relations programs will be approved by the Warden prior to being placed into effect. When basic policy has been approved, the staff member responsible will carry out the details of his

program, using imagination and initiative in developing information and public participation.

C. The Warden, with the assistance of the Information Officer, will coordinate the various community relations programs.

D. Tours by groups and individuals will be arranged through the Warden's Office.

E. Visits to the Adult Authority are cleared through the Classification and Parole Representative.

VII. *Methods of Encouraging Positive Community Relations:*

A. Public tours of the institution:

1. During the months of February through October, tours of mixed groups, societies, clubs, etc., of approximately 200 adults, are conducted on Saturday nights. A charge is made to cover costs of food, escort, and a contribution to the Inmate Welfare Fund. The Officer of the Day is ordinarily in charge.

2. Specific reservations are required for individuals or groups. Arrangements are made through staff designated by the Warden.

3. Tours by approved special guests will be arranged by the Warden's Office at any time during the normal working day. The Custodial Division will furnish officer escort, unless otherwise arranged; i.e., educators may be escorted by staff of the Education Department, etc. Such tours begin and end in the Warden's office, with an interview with the Warden or the Associate Warden, Administration, if possible.

B. Citizen participation in the institutional program:

1. Trade Advisory Groups working with both staff and inmate committees.
2. Academic Advisory Committee (works with staff and inmate committee).
3. Citizen volunteers (working with Alcoholics Anonymous, Speakers Clubs, athletic events, and other inmate groups).

C. Exhibitions and displays (annual Art Show, exhibits at fairs, music festivals, etc.).

D. Publications and articles:

Employees are encouraged to submit factual articles for the Correctional Review, professional journals, trade publications, etc. Such articles must be cleared through the Warden's Office for submission to Central Office.

E. Speaking Engagements:

1. Employees, if invited, and with advance notification to their supervisors, can speak to groups on the operations of the institution and the Department of Corrections.

2. Such talks or speeches should be:

   a. Objective, informative and factual. Personal opinions should be clearly identified as such.

   b. Non-partisan in controversial areas, should these arise during discussions.

/s/ L. S. Nelson, Warden

L. S. Nelson, Warden

SQ 10 #300 Dec. 27, 1966
Revised Feb. 15, 1972

Appendix B

CALIFORNIA STATE PRISON
SAN QUENTIN

November 15, 1971

Visiting Privileges

1. Receiving visits is a privilege, not a right and is subject to restriction or forfeiture if any of the following rules are violated.
2. Inmates may receive visits from ten (10) approved persons, who must be members of the family or friends of long standing. Two (2) of the ten (10) visitors will be allowed four (4) visits per month and the others, one (1) visit per month. The inmate will make this designation in writing to the Mail and Visiting Lieutenant. No person under eighteen (18) years of age may visit unless he/she is a member of the inmate's immediate family or unless accompanied by an approved visitor of the inmate who is over eighteen years of age. The visiting period will be one (1) hour in duration.
3. No one may visit unless already approved and on the visiting card. Some exceptions will be made for members of the immediate family if time permits.
4. Inmates who wish to place new visitors on their visiting card will send a completed CDC-105 form in a letter to the prospective visitor and the mail room will remove the 105 and substitute a blank

CDC-106. On completion of the 106 the prospective visitor should mail it with a letter to the inmate. The mail room staff will remove the completed 106 and forward it to the mail and visiting Lieutenant for approval. If facts don't agree, the visiting will be denied and the parties so notified. In some cases where there is doubt clarification will be requested.

5. No more than four (4) people will be allowed on the grounds to visit an inmate at one time. If there are more than four (4) in the party, the visiting hour must be divided among them.
6. Inmates may receive visits from prospective employers with the permission of the Warden or his authorized representative if the visitors are not on the approved list.
7. Visits from former inmates of any penal institutions or from persons involved in or convicted of any type of narcotics offense are prohibited, except by special permission of the Warden. A visitor who is on probation or parole must also have the permission of his supervisor to visit.
8. No male visitors wearing black or blue jeans will be permitted to visit.
9. Visitors are not permitted to leave money or any other articles at the institution for an inmate nor are they allowed to take anything from an inmate. Money must be sent in through the mail by Post Office Money and must be made payable to the Department of Corrections and must indi-

cate the register number and name of the inmate for whom intended.

10. Visiting Hours: Monday, Thursday, Friday:
8:00 a.m. to 3:00 p.m.
Saturday, Sunday & Holiday:
8:00 a.m. to 2:00 p.m.
No Visiting on Tuesday and Wednesday

11. No visits are permitted on New Year's Day because of special activities. On certain days, such as Good Friday and the days preceding Christmas and New Year's Day, the visiting room will close one (1) hour early (on week days). In the event the institution should be in a state of unrest, visiting privileges are subject to cancellation.

12. Anyone entering the institution grounds is subject to being checked through the metal detector, and whenever deemed necessary the Warden or his authorized representative may order the searching of anyone who enters the institution grounds, and persons refusing such search will be denied entrance.

13. All persons entering the institution grounds will carry valid identification in their possession. Example: A valid California State Department of Motor Vehicles Identification Card, or a Driver's License. Also fingerprinting may be requested. If a person does not possess valid identification, or if he/she refuses to be fingerprinted, he/she will be denied entrance. Out of state visitors will have their identification checked by the Mail and Visiting Lt.

14. Bringing firearms, explosives, alcoholic beverages, benzedrine or drugs on the prison grounds constitutes a felony. Visitors should be sure they do not possess any of these when entering.

15. Visitors will not be passed to the Warden's Office without prior clearance from that office. They will pass through the metal detector before being passed to the Warden's Office.

16. Visitors will not carry cameras, tape recorders, purses, bags, briefcases, or similar objects onto the prison grounds. They may take money, identification, loose cigarettes and necessary personal medication. All items carried by the visitor will be shown to the Officer at the metal detector for his inspection. If the items are difficult to search or if they fail to pass the metal detector, the visitor will be instructed to remove them from the grounds. Visitors should also avoid wearing articles of clothing or jewelry that contain metal.

17. No person will be permitted to visit with more than one (1) inmate of the California Department of Corrections unless said person is a member of the immediate family of both inmates.

18. Inmates in Segregation, Isolation, Adjustment Center or on hospital status will be allowed to receive one (1) visit per week from all sources, exclusive of Attorneys and investigators. Inmates on Isolation status will be limited to a one-half (½) hour visiting period. Exceptions will be made with the approval of the Mail and Visiting Lieutenant.

19. A member of the bar will be permitted to interview an inmate client with the consent of the inmate, during normal visiting hours, subject to institutional regulations. Recording of interviews by tape recorders or other voice recording equipment will not be permitted, nor will cameras be allowed. Investigators for an Attorney of Record will be confined to not more than two (2). Such investigators will be either a member of the Bar or a California State Licensed Investigator. Designation shall be in writing.
20. Press and other media interviews with specific individual inmates will not be permitted.

Appendix C

Washington Post Co. v. Kleindienst, 357 F.Supp. 770 (D.D.C. 1972) Hearing on Motion For Preliminary Injunction. March 23, 1972. Reporter's Transcript 118:20-121:25.

The Court: I don't want to cut Mr. Hanon (sic) off, but I am sitting here trying to find out what you did about it. What are your rules now?

The Witness: [Raymond K. Procunier] We have changed it now. The interview policy with the media is almost identical with the Federal requirements. The only change that we made is this: We will not allow an interview, a press interview or interview with the media at their request by specific name and number. We haven't changed the accessibility of the institution and talking to inmates.

The Court: So, it is more or less like the Federal policy?

The Witness: Almost identical to the Federal policy, with a few modifications. We changed from the open policy to what the Federals are doing now. We have some other changes but they are minor.

By Mr. Hannon: [Assistant United States Attorney]

Q. The significant change is that the press is no longer allowed to interview prisoners, as such?

A. The significant change is that they still interview inmates. They interview or talk with them, or any way you want to put it, but they do not do it on their own initiative with specific inmates. I can expand on that, if you want me to, to make it clear.

Q. Please do.

A. For example, just recently, because of the interest in California in the death penalty, a reporter from one of the major newspapers in the State wanted to do a story on the death penalty and he wanted to talk to some men who had had the death penalty commuted to life. Prior to that, he would have come in with several names of inmates he wanted to talk to and he would have talked to them. Now we had each warden and superintendent give us the names of four, five men who would talk to him; and we gave him the list and said: Who do you want to talk to.

The Court: In other words, you made sure he wasn't talking to a trouble-maker?

The Witness: I am sure they did. I didn't give them those instructions.

The Court: That was the general effort?

The Witness: The general effort is to minimize publicizing the trouble-makers.

The Court: Right.

The Witness: That is the general thrust of the thing.

The Court: Permitting interviews, otherwise?

The Witness: Yes.

The Court: The Federal policy is flat. You understand the Federal policy is no interviews. The Federal policy prohibits interviews without qualification.

The Witness: May I expand on this a little bit?

The Court: Yes, I want your help. You have had so much experience.

The Witness: What I heard them talking about earlier, interviews or conversations, we don't distin-

guish between the two. If an accredited reporter wants to tour San Quentin or Folsom, or some place, and in the process of the tour, as he is going around, he can hold conversations or interviews, or whatever he wants, with whatever inmates he wants to. He can't come in and say, I want to see Joe Doakes. We won't let him do that.

The Court: When he has that conversation, chat or interview, is it supervised or can he talk to him without any custodial or other person overhearing?

The Witness: That would depend on the circumstances. This decision would be made on an individual basis. If I were walking through the yard with a newspaperman and he wanted to talk to an inmate, it would depend on the inmate and the circumstances, whether I would step aside or not.

The Court: Right. On the other hand, if he is interested in a subject matter, such as the death penalty, you will permit some interviews there of selected people, not chosen necessarily by him; is that correct?

The Witness: Not specifically. Not chosen by him under any circumstances, but we allow that type of conversation or interview.

The Court: That is unsupervised?

The Witness: Yes, can be or can't be. We make that decision on an individual basis.

The Court: A wholly individual basis?

The Witness: Yes.

The Court: Now I understand. Thank you.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants,*

vs.

BOOKER T. HILLERY, JR., et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' BRIEF

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California (Appendix A to the Jurisdictional Statement filed herein) is reported at 364 F.Supp, 196.

JURISDICTION

The order of the district court was entered on August 16, 1973. Notice of appeal to this Court was

filed in the district court on December 12, 1973. The appeal was docketed in this Court on November 9, 1973, as No. 73-754. On January 7, 1974, this Court noted probable jurisdiction and granted the motion of appellees for leave to proceed in forma pauperis. On January 21, 1974, this Court ordered argument in the case consolidated with *Pell v. Procunier,* No. 73-918. The jurisdiction of this Court to review the decision of the three-judge panel by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b).

STATE PROVISION INVOLVED

California Department of Corrections Manual Section 415.071: "Press and other media interviews with specific individual inmates will not be permitted."

QUESTIONS PRESENTED

1. Does the First Amendment afford a prison inmate a right to demand and conduct face-to-face meetings with the press and other media?

2. Do prison officials have discretion to control an inmate's access to the press and other media by regulations which are rationally related to justifiable purposes of imprisonment?

3. When it is rationally related to justifiable purposes of imprisonment, may prison officials limit an inmate's access to the press and other media to written communications and to face-to-face meetings dependent upon the random selection of inmate interviewees?

STATEMENT OF THE CASE

A. The Paramount Responsibilities of the Department of Corrections.

Appellant, Raymond K. Procunier, has had approximately 26 years of experience in the field of corrections. With the exception of approximately one year, this experience has been gained as an employee of the California Department of Corrections. He joined the Department in April of 1948 as a correctional officer at one of the state institutions. He subsequently held a variety of institutional and departmental positions. In 1967, he became Director of Corrections of the State of California (A. 122, 280-281).

Director Procunier's position is that the Department has a dual obligation: first, it must insure that persons who are committed to the state institutions are housed securely; second, it must do everything within its power and resources to prepare such persons to return to free society (A. 292). The magnitude of the Department's obligations is demonstrated by the fact that approximately 20,000 convicted felons are currently housed in the state institutions (A. 281-282). A formidable obstacle to the fulfillment of these obligations is the further fact that 34 inmates were murdered during 1972, and 10 correctional officers were murdered between 1970 and February 14, 1973 (A. 256).

As set forth in the opinion below, on August 21, 1971, "[d]uring an escape attempt at San Quentin three staff members and two inmates were killed. This

was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem." *Hillery v. Procunier,* 364 F.Supp. 196, 198 (N.D.Cal. 1973). The Department's decision to adopt a stricter policy regarding inmate interviews with the press and other media was prompted by these events and was premised on a judgment that former practices had adversely affected prison security and the rehabilitation of inmates, and had imposed serious burdens on the correctional officers (A. 249, 286-288, 292-293, 296-297).

The adoption of section 415.071 was preceded by careful consideration of alternative solutions to the problems facing the Department. Director Procunier repeatedly consulted with his own staff in order to arrive at a solution for controlling the problems which had arisen under the Department's previous interview policy (A. 302). The Department attempted to have a modified version of section 415.071, but found that it would not work (A. 302); imposition of a selective regulation was rejected as legally suspect (A. 303). As stated by Director Procunier, section 415.071 was prescribed as an administrative remedy only "after a great deal of agonizing . . ." (A. 302).

B. The Consequences of the Department's Prior Interview Policy.

Prior to settling upon the policy of section 415.071, the Department permitted named inmates to be interviewed by accredited representatives of the news media

(A. 282, 286). However, certain named inmates became the subject of extensive press coverage. One inmate for example, held 66 interviews over an 18-month period (A. 297). Another inmate, who subsequently was killed during the escape attempt of August 21, 1971, held 33 interviews from August of 1970 through June of 1971 (A. 285-286). In January of 1969, this inmate along with two others had been charged with the murder of a correctional officer at one of the state institutions (A. 285). At the time that the correctional officer was killed, this inmate was already known within the institution (A. 285). Press interest became focused on this inmate and his codefendants (A. 293). Partially as a result of the extensive press attention, this inmate became, in effect, a public figure (A. 285). The results of his numerous interviews with the press were carried in almost all of the publications which came into the state institutions (A. 286-287). This inmate utilized his frequent contact with the press as a vehicle for reaching dissident inmates. His message to such inmates was essentially that the manner in which to change the correctional system was to be non-cooperative, and that any cooperation would serve to perpetuate the system (A. 287).

C. The Administrative Decision that a Change in Interview Policy was Essential.

The Department's decision to alter its policy regarding inmate interviews was premised on its determination that its previous policy was impairing the ability to fulfill its dual obligation to maintain security and

to foster rehabilitation, and was imposing a serious burden on the administration of the state correctional facilities (A. 286-288, 292-293, 296-297).[1]

1. Threats to Security

The Department determined that an augmentation of disciplinary problems within its institutions was in part the result of the expansive press coverage which was being afforded to inmates who advocated a policy of non-cooperation (A. 287-288). In terms of management principles, it was the Department's opinion that these were destructive messages (A. 287). Under the Department's unrestricted policy, newsmen could focus upon several inmates, and these inmates could be interviewed by a large number of newsmen, thus leading to extensive coverage (A. 253). It was believed that the security risk posed by an inmate was increased as press coverage of the inmate increased (A. 263).

The Department's view was that the tragic events of August 21 were partially attributable to the extensive press attention which had been afforded to one of the inmates who was killed on that day (A. 249). The Department's concern was that the extensive press exhibition afforded to this inmate had served to magnify his negative leadership role, and to influence other inmates to also adopt an attitude of non-cooperation (A. 287). The Department found that the extensive press coverage had created in this inmate a false sense of status, and had conveyed to other in-

[1]Throughout the proceedings below appellants repeatedly emphasized that section 415.071 was essential to the fulfillment of their obligations (A. 46-47, 87-89, 116, 199, 274).

mates who were confined in the same lock-up unit a false perception of this inmate, and that this contributed to the tragic occurrences of August 21 (A. 255).

More recently, the Department has been confronted with the phenomena of rival groups of inmates (A. 249). The killing of 34 inmates during 1972 was partially attributable to the prevalence of gang warfare within the correctional institutions (A. 256). One method by which the leadership of such groups can attempt to assert influence is through press attention to their actions. Accordingly, the Department, the administrative agency with penal expertise, has determined that such press coverage might serve to set one group of inmates against another. The existence of group rivalry poses a serious problem within the institutions and can lead to violent confrontations between inmates (A. 249); stimulation of rival leaders by coverage of gang activities can serve to plant the seed of further violence (A. 256-257).

2. Impairment of Rehabilitation

One of the major considerations which led Director Procunier to conclude that a change of policy was required was the adverse effect which the Department's unrestricted interview policy was having on the Department's efforts at rehabilitation of inmates (A. 292-293). As stated by Director Procunier, "The first thing that happens, we found out over the years, collectively, that before a man makes any kind of a change, there must be a change in his attitude. If a man is encouraged by increased notoriety and this encourages others to pursue the same thing, their atti-

tude is such that we can't deal with them in a constructive way. This is one of the major considerations in changing the policy." (A. 292-293). The Department felt very strongly that the extensive press coverage afforded to an inmate who espoused a practice of non-cooperation encouraged other inmates to adopt this attitude and impaired the institution's efforts to deal with the inmates in a constructive manner (A. 292-293).

Director Procunier has also recognized that if an inmate is continually involved in conducting interviews he will have little time to concentrate on other useful activities such as attendance of classes, meeting with counsellors, obtaining psychiatric treatment and participating in other programs (A. 129).

3. Burdens on Administration

The Department was also concerned with the time and effort which was involved in escorting inmates and newsmen under the unrestricted policy (A. 246-247). If the inmate was in lockup status, a half-day of employee time was required in order for an interview of one hour or less to be held (A. 296-297). Given the number of inmates confined in the Department's institutions, the potential administrative burden of an unrestricted policy is staggering. If only ten per cent of the inmates held semi-annual interviews, some 4,500 interviews would have to be arranged by the Department's staff (A. 130).

Due to the wide coverage afforded one inmate, the Department also found that it would be administratively impossible to review all incoming publications

which covered the interviews (A. 286-287). California Penal Code section 2600 recognizes the right of an inmate to "purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office." This same statute recognizes the authority of prison officials to exclude "any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; . . ." As the results of the interviews were in almost all of the publications coming into the institution, and as a large number of publications came into the institution, it would have been administratively impossible to review each publication in order to exercise this authority to exclude specific issues of specific publications (A. 286-287).

D. Interview Policy after Adoption of Section 415.071.

Section 415.071 provides: "Press and other media interviews with specific individual inmates will not be permitted." As found by the district court, "[t]he regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the warden, select at random interviewees from the prison population. (Footnote omitted.) Thus, media representatives are able to interview an inmate, but unable to select a particular inmate. Similarly, a prisoner who happens to be randomly selected can express himself personally to the newsmen or journalists, but cannot initiate an interview himself. (Footnote omitted.)" *Hillery v. Procunier,* 364 F.Supp. 196, 199 (N.D.Cal. 1973). As recognized by

the district court, section 415.071 does not preclude direct written communications between press representatives and specifically designated inmates; it has no application to face-to-face meetings between inmate authors and their publishers; it does not prohibit face-to-face meetings between press representatives and inmates who are selected at random. *Hillery, supra,* 364 F.Supp. at 199, n. 3, 200.

1. Written Communications

By its terms, section 415.071 applies only to interviews. Throughout the proceedings below, appellants repeatedly observed that the Department permitted individual inmates to send letters and manuscripts to media representatives, and that the plaintiffs had not alleged that the Department had in any way interfered with their written communications (A. 14, 18, 47, 120, 199, 274).

In support of a motion to dissolve a temporary restraining order which had been issued by a single district court judge pending the hearing before the three-judge court (A. 3), appellants observed that there was not "any showing that plaintiffs or other inmates are unable 'to effectively communicate information concerning their confinement in San Quentin State Prison' by such correspondence." (A. 120). Appellees' pleadings suggest that any assertion that appellees were illiterate and incapable of effectively communicating by writing would have been specious.[2]

[2]Although both the complaint and the first amended complaint were filed as a class action (A. 5, 25-26), the case was never certified as a class action. *See* Fed. R. Civ. P. 23(c).

The complaint was filed by inmate Hillery *in pro per* and alleged that inmate Hillery was the owner of two short stories (A. 7). The amended complaint alleged that "[t]he purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter." (A. 23). The amended complaint realleged that inmate Hillery was the author of two short stories (A. 26). The amended complaint further alleged that inmate Spain "is a talented black writer" and that "[o]ne of his letters has already been published in a recent book, edited by plaintiff PELL, *Maximum Security,* Dutton 1972." (A. 27; *see also* A. 159-163).[3]

Individual inmates, of course, also have access to the media through other visitors and correspondents, such as family members, friends, attorneys and clergymen (A. 262-263; *see also* A. 274). Accordingly, access to the media is not dependent on an inmate's literary abilities.

2. Meetings with Publishers

Meetings between inmate authors and prospective publishers are not considered news media interviews, and hence are not prohibited by section 415.071. Wardens and superintendents are authorized to permit such visits on a case-by-case basis. On at least one occasion, an inmate has been allowed to have visits

[3]In its opinion, the court suggested that written communications were inadequate if the inmate were inarticulate or if his story required further verification. *Hillery v. Procunier,* 364 F.Supp. 196, 201 (N.D. Cal. 1973). There is nothing in the record of this case which indicates that appellees are illiterate or inarticulate.

with a "ghost writer" who assisted him in the preparation of a manuscript (A. 124).[4]

The contents of an inmate's manuscript is not a ground for denying such a meeting unless the contents would be excludable from the institution under California Penal Code section 2600 (A. 56).[5] Experience indicates, however, that just as is the case with other authors, inmate authors can obtain publication of their manuscripts without the necessity of face-to-face meetings with their publishers. This is reflected by the fact that six inmates at San Quentin, who had been condemned, had their writings published without having had interviews with their publishers (A. 18-19, 42).[6]

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[4]During the course of the proceedings below, appellants noted that the meeting sought by appellee Hillery was thus not precluded by section 415.071 (A. 111, 119).

[5]California Penal Code section 2600(4) provides in pertinent part as follows: "Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riots, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

[6]The names of these inmates and their publications are as follows: Massie: "Teen Recollections from Death Row," Teen Magazine, January 1971; "Death by Degrees," Esquire, 1970 or 1971; Eli: "A Land Called Freedom," Los Angeles Free Press, March 26, 1971; Welch: "From Christ to Crime to Death Row," Baptist Men's Journal, March 10, 1971; "God is My Cell Mate," Christian Economics, May 6, 1971; "Death Row S. Q. Prison," City Magazine, Ltd., November 22, 1971; "Money Can't Buy God," Christian Freedom Foundation, August 19, 1971; "Christians Come to Jail," Christian Freedom Foundation, September 3, 1971; Robinson: "The End Was the Beginning," Christian Freedom Foundation, July 30, 1971; Morse: "The One-Way Street," Listen, December 27, 1971; King: "Happiness is Knowing God," Marian Helpers Bulletin, November 26, 1971. (A. 19, 42).

3. Meetings with Press Representatives on General Topics

Section 415.071 does not bar press representatives from the state's correctional institutions, nor does it bar inmates in general from being interviewed by press representatives (A. 57-58, 282, 288-289). Press representatives may tour the institutions, and such tours can cover the maximum and minimum security sections within the institution (A. 243-244, 259). During the course of such tours, the press representatives may interview any inmate on any subject (A. 243-244, 290). If the press representative happens to be familiar with an inmate, he is not precluded from talking to him (A. 259). Similarly, inmates are not precluded from asking the press representative whether he wishes to talk with them (A. 259). If security considerations permit, prison personnel will step aside in order that the interview can be conducted in confidence (A. 244, 300).

4. Meetings with Press Representatives on Special Topics

Section 415.071 does not bar press representatives from entering the institution for the purpose of gathering information for a story on a specific topic, nor does it bar inmates in general who have information pertaining to the topic from being interviewed (A. 242-243). If the press representative wishes to do a story on a specific program, such as Alcoholics Anonymous or an ethnic study course, he may sit in on the group meeting and the inmate participants may be interviewed by him (A. 243).

Although the press representatives may not designate by name a specific inmate to be interviewed, they

may designate a group of inmates to be interviewed. Accordingly, when one of the state's major newspapers informed the Department that it wished to do a story on the death penalty and wished to obtain the opinions of men who had had a death sentence commuted to a life sentence, the Department asked the warden and superintendent at three institutions to submit a list of four or five inmates who would consent to such interviews. The reporters then interviewed the inmates and wrote the story (A. 242-243, 289). The determination as to whether such interviews are to be confidential is made on an individual basis (A. 290-291).

Similarly, at the time that death row was being phased out, a television reporter asked to film activities on death row and to speak to inmates whom he might encounter. The television reporter was permitted to conduct this film interview (A. 243).

E. The Determination of the District Court.

The district court concluded that inmates have a right under the First Amendment to face-to-face meetings with media representatives, that the limitation of such face-to-face meetings resulting from section 415.071 could be justified only by a compelling state interest, and that appellants had failed to demonstrate such an interest. *Hillery v. Procunier,* 364 F.Supp. 196, 200-202 (N.D.Cal. 1973). The district court held that section 415.071 was unconstitutional, and granted summary judgment in favor of plaintiff inmates. *Hillery, supra,* 364 F.Supp. at 204.

SUMMARY OF ARGUMENT

On August 21, 1971, during the course of an escape attempt from one of California's correctional facilities, three staff members and two inmates were killed. The Department concluded that these tragic events were related to its unrestricted interview policy. Under this policy, individual inmates could monopolize press attention, and use this as a vehicle for enhancing their influence over other inmates, and for promulgating their thesis that inmates should refuse to cooperate with correctional authorities. One of the inmates killed on August 21, 1971, had utilized his access to the press to achieve such destructive objectives. The Department concluded that its unrestricted policy impaired its ability to maintain security and to promote rehabilitation, and that it imposed a serious administrative burden on its staff. After considering alternative solutions, Director Procunier adopted section 415.071.

Under section 415.071 inmates can be interviewed only on a random selection basis. This solution affords inmates in general an opportunity for face-to-face interviews with the press, while at the same time reducing the possibility that a specific inmate will monopolize press attention with destructive consequences.

Section 415.071 does not violate the constitutional rights of prisoners. Even in society, the exercise of First Amendment rights is necessarily circumscribed by various factors. Within a correctional institution, these same factors are equally operative. However,

they must be viewed in the light of the considerations which underlie the correctional system, for such considerations necessarily limit the rights of prisoners. A consideration of the physical realities of imprisonment, the purposes to which prison facilities are dedicated, the legitimate exercise by prison authorities of established governmental powers, and the status of a prisoner in relation to the achievement of the legitimate goals of the correctional system establishes that individual prisoners do not retain a right to demand and to conduct face-to-face meetings with representatives of the media.

Prison regulations must be upheld if they are rationally related to the furtherance of the justifiable objectives of our penal system. As incarceration necessarily results in a justifiable limitation of rights, regulations which apply to all prisoners do not create suspect classifications or impinge on fundamental rights. It is clear that section 415.071 does not have such an effect. It applies to all prisoners. It does not deprive prisoners in general of an opportunity to meet face-to-face with the press. It does not deprive individual prisoners of an opportunity to communicate in writing directly with representatives of the press. It does not deprive individual prisoners of an opportunity to communicate with representatives of the press through other visitors and correspondents, such as family members, friends, attorneys, and clergymen.

Additional considerations affirmatively sustain the application of a rational basis test. The determina-

tion of what administrative remedies must be employed to maintain security and to promote rehabilitation must necessarily be based on an informed knowledge of conditions within the state's correctional facilities. The choice of alternative remedies involves the application of expert judgment in an area which is fraught with uncertainties. The administration of state correctional facilities is an activity in which each state has a strong interest and which is intrinsically related to state laws, regulations, and procedures.

Section 415.071 is a valid regulation as it is rationally related to the justifiable objectives of maintaining security and promoting rehabilitation. It imposes a narrow limitation, which serves to eliminate the impairment of security and rehabilitative efforts which were occasioned prior to its adoption. The state has a compelling interest in insuring the maintenance of security and the promotion of rehabilitation.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT AFFORD A PRISON INMATE THE RIGHT TO DEMAND AND CONDUCT FACE-TO-FACE MEETINGS WITH THE PRESS AND OTHER MEDIA.

In *Price v. Johnston,* 334 U.S. 266, 285 (1948), this Court stated, "a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." Accordingly, this Court recognized that even in the context of a judicial

proceeding, wherein the prisoner's life or liberty was at stake, the prisoner had no absolute right to meet face-to-face with the judicial officers who would decide his case. This limitation on a prisoner's rights was premised on the observation that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price, supra,* 334 U.S. at 285. This Court observed that "[o]ral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates." *Price, supra,* 334 U.S. at 286.

The district court held "that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment." *Hillery v. Procunier,* 364 F.Supp. 196, 200-201 (N.D. Cal. 1973). In this regard the district court was mistaken as appellees' First Amendment rights are necessarily limited by the special considerations underlying the penal system; face-to-face meetings with press and other media representatives are not an essential aspect of appellees' retained rights under the First Amendment and may be limited where reasonable necessity dictates.

As this Court has recently reaffirmed, " 'The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted].' (Citations omitted)." *Miller v. California,* ..... U.S. ....., 93 S.Ct. 2607, 2614 (1973). This Court has explicitly rejected the notion "that people who want to propagandize protests or

views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida,* 385 U.S. 39, 48 (1966). Accordingly, it is appropriate to consider first some of the factors which necessarily curtail the First Amendment rights of citizens who are not confined in penal institutions, and to consider then whether similar factors necessarily limit the First Amendment rights of appellees who are imprisoned.

A citizen's ability to have his views reported by the media is necessarily circumscribed by the rights of the media. This Court has recognized that even with regard to the use of the medium of broadcasting, wherein the public's right is paramount to the First Amendment right of the broadcasters, the First Amendment does not require that the citizen be given a vested right of access to the medium of broadcasting. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.,* 412 U.S. 94, 126-127 (1973). This Court suggested that insofar as access to this limited medium is concerned, "The admonition of Professor Meiklejohn that 'What is essential is not that everyone shall speak, but that everything worth saying shall be said' is peculiarly appropriate. (Citation omitted)." *Columbia Broadcasting Sys., Inc., supra,* 412 U.S. at 122. As this Court succinctly observed, "To agree that debate on public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators." *Columbia Broadcasting Sys., Inc., supra,* 412

U.S. at 125. This Court found that the editorial power of a privately owned newspaper was even more extensive, being limited "by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Columbia Broadcasting Sys., Inc., supra,* 412 U.S. at 117. A citizen in free society thus has no absolute right under the First Amendment to have his views reported by others.

A citizen's ability to engage in communicative conduct in a public building is necessarily circumscribed by the purposes to which the building is dedicated.[7] As stated in *Adderley v. Florida,* 385 U.S. 39, 47 (1966), "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." In *Adderley* it was recognized that jails are built for security purposes and are not open to the public. *Adderley, supra,* 385 U.S. at 41. This Court explicitly rejected the contention that since the jail grounds were an appropriate place for a civil rights demonstration there was a constitutional right to remain there over the objections of the custodian. *Adderley, supra,* 385 U.S. at 47.

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[7]A citizen's ability to engage in communicative conduct on private property is similarly circumscribed. *See Lloyd Corp. v. Tanner,* 407 U.S. 551, 567-568 (1972). In *Lloyd* this Court upheld "the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations" as against "an asserted First Amendment right to distribute handbills in [the] shopping center, . . ." *Lloyd, supra,* 407 U.S. at 552, 570.

Similarly, in *Cox v. Louisiana*, 379 U.S. 559, 562 (1965), it was recognized that "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." It was held that a statute[8] which prohibited such conduct was "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Cox, supra*, 379 U.S. at 564. Accordingly, even where a public building has a symbolic value for purposes of conveying a particular message, a citizen has no right to use the public building as a forum for communicative conduct which interferes with purposes to which the building is dedicated.[9]

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[8]The statute which was upheld in *Cox* provided as follows: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year or both." La.Rev.Stat. §14:401 (Cum.Supp. 1962). *Cox, supra*, 379 U.S. at 560.

[9]As stated by the Second Circuit, "The First Amendment is not a license to impede and disrupt the orderly performance of an essential function of government, (citation omitted). The public and private interests at stake must be weighed. For instance, the Government's use of a public building for a valid and specific governmental function entitles it to limit the exercise within that building of First Amendment rights to the extent that such exercise will interfere with the performance of that function. (Citation omitted.)" *United States v. Farinas*, 448 F.2d 134, 138 (1971), cert. den., 405 U.S. 934. In *Farinas*, the Second Circuit recognized that the government could prohibit the distribution of anti-war literature and the giving of anti-war speeches inside an induction

A citizen's right to meet face-to-face with others is necessarily circumscribed by the legitimate exercise of established governmental powers. In *Zemel v. Rusk*, 381 U.S. 1, 3 (1965), a citizen contested the validity of a refusal by the Secretary of State to validate his passport for travel to Cuba. The citizen alleged "that the 'travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies'." *Zemel, supra*, 381 U.S. at 16. This Court first concluded that the Secretary of State had statutory authority to refuse to validate a citizen's passport for travel to Cuba. *Zemel, supra*, 381 U.S. at 7-13. While this Court recognized that the Secretary's action did reduce the flow of information regarding Cuba, this Court found that the resulting inhibition on the citizen's movement did not deprive the citizen of a First Amendment right. *Zemel, supra*, 381 U.S. at 16-17. In *Kleindienst v. Mandel*, 408 U.S. 753, 754 (1972), citizens contended that the refusal to allow an alien scholar to enter the United States for the purpose of

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center when such conduct interfered with the orderly conduct of the induction process. *Farinas, supra*, 448 F.2d at 1338-1339. In *LeClair v. O'Neil*, 307 F.Supp. 621, 625 (D.Mass. 1969), aff'd. 401 U.S. 984 (1971), the court observed, in reference to the right of members of a welfare organization, a welfare recipient, and a paid organizer, that "[w]hatever First Amendment rights existed in the Welfare Office, they could not be exercised at the expense of the primary purpose the office was designed to serve."

meeting with them violated the citizens' rights under the First Amendment. This Court declined to dispose of the First Amendment contentions of the citizens on the ground that the mode of regulation pertained to physical movement. *Mandel, supra,* 408 U.S. at 764. Similarly, this Court declined to find that the First Amendment contentions were obviated by the fact that the citizens had access to the alien's ideas through means other than face-to-face meetings. *Mandel, supra,* 408 U.S. at 765.[10] Nevertheless, this Court determined that the citizens' right to meet face-to-face with the alien scholar was necessarily circumscribed by the legitimate exercise of established governmental power. This Court concluded as follows: "In summary, plenary congressional power to make policies and rules for the exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." Accordingly, a citizen's direct communications with others is necessarily circumscribed

[10]This Court recognized, however, that "alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—. . ." *Mandel, supra,* 408 U.S. at 765.

by the legitimate exercise of established governmental powers.[11]

A citizen's rights under the First Amendment are also necessarily circumscribed by the citizen's status, when his status relates to the achievement of important governmental objectives. In *United States C. Serv. Com'n v. National Ass'n of Let. Car.*, ... U.S. ....., 93 S.Ct. 2880, 2886, 2891 (1973), and in *Broadrick v. Oklahoma*, ... U.S. ....., 93 S.Ct. 2908, 2918 (1973), this Court held that the Constitution does not preclude prohibiting employees of the federal and state governments from engaging in identifiable acts of political management and campaigning even though other citizens have a right under the First and Fourteenth Amendments to engage in such conduct. This Court observed that such a holding "would no more than confirm the judgment of history, a

[11]This Court's recent decision in *California v. LaRue*, 409 U.S. 109 (1972), also demonstrates that conduct which is protected by the First Amendment is necessarily limited by the legitimate exercise of established governmental power. In *LaRue*, holders of liquor licenses and dancers at premises operated by such licensees contended that certain regulations, which were issued by the state agencies charged with authority to issue and to revoke such licenses, and which prohibited certain forms of entertainment in licensed premises, were unconstitutional on their face. *LaRue, supra*, 409 U.S. at 110-112. This Court recognized that the regulations on their face would prohibit some visual presentations which were protected under the First Amendment. *LaRue, supra*, 409 U.S. at 116-118. Nevertheless, this Court concluded as follows: "The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-First Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution. (Footnote omitted.)" *LaRue, supra*, 409 U.S. at 109.

judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." *National Ass'n of Let. Car., supra,* 93 S.Ct. at 2886. This Court recognized that the prohibition was justified by the government's interest in the impartial administration of laws, the fostering of public confidence, the prevention of the use of governmental employees by political machines, and the prevention of the coercion of governmental employees. *National Ass'n of Let. Car., supra,* 93 S.Ct. at 2890-2891. Although this Court recognized that it could be urged that prohibiting coercion might sufficiently protect government employees, this Court did not find any constitutional obstacle to the use of the more restrictive alternative of prohibiting governmental employees from engaging in identifiable political acts. *National Ass'n of Let. Car., supra,* 93 S.Ct. at 2891. It is thus apparent that a citizen may be prohibited from exercising certain rights under the First Amendment when because of the citizen's status, the prohibition serves to achieve important governmental objectives.

The decisions of this Court thus establish that the First Amendment rights of citizens are necessarily circumscribed by a variety of factors. Prior to considering the manner in which these factors are to be applied to the factual situation presented by this

case, it is appropriate to consider the decision in *Dash v. Commanding General, Fort Jackson, South Carolina,* 307 F.Supp. 849 (D.S.Car., Col.Div. 1969), aff'd 429 F.2d 427 (4th Cir. 1970), *cert. denied,* 401 U.S. 981. This decision involved the application of several of these factors to circumstances, which while not directly analogous to those presented here, are in some respects comparable.

In *Dash,* servicemen contended that a regulation of the Post Commander, which restricted the distribution of published material on post, and the refusal of the Post Commander to permit a public, open meeting on post for the purpose of a free discussion of the Viet Nam war and related complaints were unconstitutional. *Dash, supra,* 307 F.Supp. at 850. The court rejected the contentions of the servicemen, concluding that the Post Commander could restrict the distribution of literature on post and could ban public meetings on post when there was a reasonable basis for concluding that such activities represented "a clear danger to the loyalty, discipline, or morale of his troops." *Dash, supra,* 307 F.Supp. at 855, 856.

The court began its discussion of the merits of the case as follows:

> "At the outset it should be noted that a serviceman's right of free speech is not absolute. (Footnote omitted). With his induction into military service, he 'necessarily accepts some abridgment of his right of free speech.' (Footnote omitted). Thus, in a recent attempt to order and rationalize existing decisions interpreting the First Amendment, a thoughtful commentator explicitly

refrained from incorporating the military into the general scheme of such rights, remarking that, 'To a certain extent, at least, the military sector or society must function outside the realm of democratic principles, including the principle of freedom of expression' and, 'Certainly, members of the armed forces, at least when operating in that capacity, can be restricted in their right to open discussion.' (Footnote omitted). This is true because, as the Supreme Court has put it, 'The military constitutes a specialized community governed by a separate discipline from that of the civilian.' (Footnote omitted). It has been aptly observed that, 'An army is not a deliberate body,' (footnote omitted) and, it may be added, it cannot function as a debating society. 'Its law is that of obedience' and discipline, and its strength lies in 'Vigor and efficiency on the part of the officer, and confidence among the soldiers * * *.' (Footnote omitted). As a recent decision phrases it, 'The need for discipline (in the Army), with the attendant impairment of certain rights, is an important factor' in the operation of an Army. (Footnote omitted)." *Dash, supra,* 307 F. Supp. at 852.

The court did not go so far, however, as to find that First Amendment rights were completely inapplicable to servicemen. The court quoted from a decision of the Court of Military Appeals in which it was held that " 'servicemen have all the protections of the Bill of Rights except such as are expressly or by necessary implication not applicable by reason of the peculiar circumstances of the military.' (Footnote omitted)." *Dash, supra,* 307 F.Supp. at 853. The

court noted, however, that the judiciary has been reluctant to interfere with military decisions regarding military personnel. *Dash, supra,* 307 F.Supp. at 853. The court quoted the following observation made by former Chief Justice Warren in The Bill of Rights and the Military, 37 N.Y.Univ.L.Rev. 181, 186-7 (1962): "'[¶] So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited. * * * [¶] This "hands off" attitude has strong historical support of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'" *Dash, supra,* 307 F.Supp. at 853-854.

In discussing the validity of the Post Commander's prohibition of a public meeting on post, during which the servicemen would undoubtedly promulgate their thesis that the Viet Nam war was immoral and inhumane, the court observed that "to organize meetings on base, to seek to create of and within the military itself a cohesive force for the purpose of compelling political decisions—and political decisions directly related to the mission of the military itself—would undermine civilian government, especially civil control of the military, and would take from respon-

sible civilian government the power of decision." *Dash, supra,* 307 F.Supp. at 856. In rejecting the servicemen's contention that their right to hold meetings on base was analogous to the right of students to hold meetings on campus, the court observed that while "schools are places for 'open, vigorous, disputations, disturbing' discussions and speeches [this was] certainly not an apt description of a military training base." *Dash, supra,* 307 F.Supp. at 857.

The decisions of this Court disclose that the First Amendment rights of a citizen are necessarily circumscribed by the following factors: (1) the rights of the media; (2) the purposes to which public facilities have been dedicated; (3) the legitimate exercise of established governmental powers; and (4) the relationship between the status of the citizen and the achievement of important governmental objectives. In order to conclude that the district court erred in finding that "face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment" (*Hillery v. Procunier, supra,* 364 F.Supp. 196, 200-201 (N.D.Cal. 1973), it is not necessary to define the perimeter of whatever rights a prisoner may have under the First Amendment. It is not even necessary to determine whether there would be included within such a perimeter a right of access to representatives of the media. As appellants repeatedly observed below, appellees have not asserted that they are precluded from directly communicating with representatives of the media by mail. (A. 14, 18, 47, 120, 199, 274). Appellants, more-

over, have demonstrated that inmates selected at random may be interviewed by news representatives (A. 57-58, 242-244, 258-259, 288-291, 300). All that is required to conclude that the court below erred is to apply these factors to the factual situation presented by this case in the light of "the considerations underlying our penal system." *Price v. Johnston, supra,* 334 U.S. 266, 285 (1948).

Just as is the case with a free citizen, an inmate's ability to meet face-to-face with a media representative is necessarily dependent upon the consent of the media representative. Accordingly, regardless of the context in which it is asserted, the purported right to meet face-to-face with a media representative is at most a conditional right. Moreover, where there is no showing that appellees are precluded from communicating in writing with representatives of the media (A. 14, 18, 47, 120, 199, 274) the significance of this conditional right is further reduced. As a consequence of "the considerations underlying our penal system" a prisoner's ability to meet face-to-face with a media representative is necessarily subject to even further curtailment. In discussing the limitations which necessarily restrict an inmate's practice of his religion, Justice Rehnquist observed: "He is assuredly not free to attend the church of his choice outside the prison walls." *Cruz v. Beto,* 405 U.S. 319, 324 (1972) (dissenting opinion). Accordingly, an inmate is not free to leave the institution in order to meet the press. Moreover, the "considerations underlying our penal system" necessarily limit the ability of an in-

mate to conduct a press conference within the walls of a correctional institution. Traditionally, such institutions are not open to the public. *Adderley v. Florida,* 385 U.S. at 39, 41 (1966). A reading of the visiting regulations which were in effect at the California State Prison at San Quentin on November 15, 1971, discloses that a member of the general public had no privilege to visit with a specifically designated inmate (A. 69-73). Considerations of security clearly dictate that meetings between inmates and others be closely supervised; considerations of rehabilitation clearly dictate that an inmate's associations with others be subject to restriction. Accordingly, the basic fact that a prisoner is not free to leave the institution and the basic fact that the public is not free to meet with a specific inmate within the institution, viewed in light of the institution's duty to maintain security and promote rehabilitation, suggest that "[l]awful incarceration brings about the necessary withdrawal or limitation" of an inmate's ability to conduct face-to-face interviews with representatives of the media.

A prisoner's ability to meet face-to-face with representatives of the media is necessarily circumscribed by the purposes to which correction facilities are dedicated. As recognized by this Court, such facilities are built for security purposes and traditionally they are not open to the public. *Adderley v. Florida, supra,* 385 U.S. 39, 41 (1966). Approximately 20,000 convicted felons are currently housed in the institutions of the California Department of Corrections (A. 281-282). The number of inmates and guards who have

been killed in these institutions in recent years (A. 256) demonstrates that it is essential that security be maintained within correctional institutions. As is the case with military institutions, " 'The need for discipline, with the attendant impairment of certain rights, is an important factor' " in the operation of correctional facilities. *Dash v. Commanding General, Fort Jackson, South Carolina, supra,* 307 F.Supp. 849, 852, aff'd 429 F.2d 427 (4th Cir. 1970), *cert, denied,* 401 U.S. 981. Similarly, to allow prisoners an absolute right "to seek to create of and within the [correctional institution] itself a cohesive force for the purpose of compelling political decisions—and political decisions directly related to the mission of the [correctional institution] itself—would undermine civilian government, especially civil control of the [correctional institutions], and would take from responsible civilian government the power of decision." *Dash, supra,* 307 F.Supp. at 856. If interviews with specific inmates serve to increase the status of such inmates as spokesmen for a policy of non-cooperation with the correctional system (A. 255, 287), this obviously impairs the ability of the correctional authorities to maintain security within the institution (A. 288). Accordingly, such interviews may be proscribed as they are inconsistent with one of the purposes to which correctional facilities are dedicated.

As observed by Director Procunier, correctional facilities are also dedicated to the rehabilitation of inmates (A. 292). Experience has demonstrated that the initial step in the rehabilitation of an inmate is the effectuation of a change in his attitude (A. 292).

"If a man is encouraged by increased notoriety and this encourages others to pursue the same thing, their attitude is such that [correctional authorities] can't deal with them in a constructive way." (A. 292-293). Just as an army "cannot function as a debating society" (*Dash, supra,* 307 F.Supp. at 852), a correctional institution cannot function as a press club. Just as a military training base is not a place for "'open, vigorous, disputations, disturbing' discussions and speeches" (*Dash, supra,* 307 F.Supp. at 857), a correctional facility is not a place where inmates can conduct public relations campaigns designed to establish themselves as spokesmen of a negative approach of non-cooperation with the institution. Justice Rehnquist has observed that "[n]one of our holdings under the First Amendment requires that, in addition to being allowed freedom of religious belief, prisoners be allowed freely to evangelize their views among other prisoners." *Cruz v. Beto,* 405 U.S. 319, 324 (1972) (dissenting opinion). Similarly, it is submitted that the First Amendment does not require that individual inmates must be allowed to meet face-to-face with representatives of the media for the purpose of freely promulgating the thesis that inmates who refuse to cooperate with the correctional system serve to change the system, while inmates who cooperate serve to perpetuate it (See A. 287).

A prisoner's actions are also necessarily circumscribed by the legitimate exercise of established governmental authority. As this Court has observed, "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately

bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen." *Preiser v. Rodriguez,* 411 U.S. 475, 492 (1973). This Court has likewise recognized "that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations." *Cruz v. Beto,* 405 U.S. 319, 321 (1972). By virtue of state law, "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confiled therein are vested in the director." (Cal. Pen. Code § 5054). As state law requires that "[t]he Director of Corrections shall have wide and successful administrative experience in adult or youth correctional programs employing rehabilitative concepts" (Cal. Pen. Code § 5051.2), it must be assumed that the Director has the necessary expertise to legitimately exercise the powers which are vested in him. The extensive background of Diretcor Procunier clearly indicates his expertise in the field of corrections (A. 122, 280-281). Accordingly, when the Director determines upon the basis of his qualified assessment of conditions in the institution, that face-to-face interviews between specific inmates and representatives of the media threaten the maintenance of security and the promotion of rehabilitation (A. 287-288, 292-293), any right which an inmate might have had to such interviews must necessarily be circumscribed by such

a legitimate exercise of established governmental authority.

The relationship between the status of a prisoner and the achievement of legitimate governmental objectives is qualitatively different from the relationship between the status of a governmental employee or even of a serviceman and the achievement of such objectives. As observed by this Court: "The relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Preiser v. Rodriguez, supra,* 411 U.S. 475, 492 (1973). Accordingly, while certain aspects of a governmental employee's or serviceman's activities are necessarily subject to restriction in order to achieve legitimate governmental objectives, all aspects of a prisoner's activities are necessarily subject to regulation in order to achieve the legitimate objectives of the penal system. The interest of the correctional system in maintaining security and in promoting rehabilitation is clearly no less significant than the interest of the government in immunizing its employees from political coercion or of the military in maintaining discipline and fostering loyalty. It is submitted that the status of the prisoner and the paramount interest of the correctional authorities in maintaining security and in

promoting rehabilitation necessarily require that interviews between the media and specific prisoners be prohibited when such interviews impair the ability of the correctional authorities to maintain security and promote rehabilitation.

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston, supra,* 334 U.S. 266, 285 (1948). The above consideration of the physical realities of imprisonment, the purposes to which prison facilities are dedicated, the legitimate exercise by prison authorities of established governmental powers, and the status of a prisoner in relation to the achievement of the legitimate goals of the correctional system warrants the conclusion that the First Amendment does not require that individual inmates have a right to demand and to conduct face-to-face meetings with representatives of the media. Where individual inmates are afforded an opportunity to communicate in writing directly with representatives of the media, the necessary withdrawal of the ability to meet face-to-face with representatives of the media does not deprive the inmates of an essential avenue of communication.[12]

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[12] *Accord Seattle-Tacoma Newspaper Guild,* 480 F.2d 1062, 1065-1066 (9th Cir. 1973); *Mitford v. Pickett,* 363 F.Supp. 975, 977-978 (E.D.Ill. 1973) *(appeal pending); Smith v. Bounds,* ..... F.Supp. ....., Civ. 2914, Slip Op. at 3-5 (E.D.N.Car. March 14, 1972) *aff'd* No. 73-1658 (4th Cir. June 8, 1973); *contra Washington Post Co. v. Kleindienst,* 357 F.Supp. 770, 779 (D.D.C. 1972), *aff'd* ..... F.2d ..... (D.C. Cir. Feb. 21, 1974); *Houston Chronicle Pub. Co. v. Kleindienst,* ..... F.Supp. ....., No. 72-H-1657 (S.D.Tex. Aug. 24, 1973); *see, McMillan v. Carlson,* ..... F.Supp. ..... (Civ. 72-2551-M, D.Mass., Dec. 31, 1973).

II

PRISON OFFICIALS HAVE DISCRETION TO REGULATE AN INMATE'S ACCESS TO THE PRESS AND OTHER MEDIA BY PROCEDURES WHICH ARE RATIONALLY RELATED TO JUSTIFIABLE PURPOSES OF IMPRISONMENT.

In *Price v. Johnston, supra,* 334 U.S. 266, 284-286 (1948), this Court stated: "[W]e emphasize that the power of a circuit court of appeals to issue [an order in the nature of a writ of *habeas corpus* commanding that a prisoner be brought to the courtroom to argue his own appeal] is discretionary. And this discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of a prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, (footnote omitted), that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced. . . . Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates." Accordingly, even in the context of a judicial proceeding, wherein the prisoner's life or liberty is at stake, the circuit courts of appeals may decline to afford the prisoner the occasion to meet face-to-face with the judicial officers who will decide his case, where the denial is rationally related to the purposes of the judicial proceeding. This Court noted that "[t]he discretionary nature of the power in

question rose out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. (Citation omitted)." *Price, supra,* 334 U.S. at 285. This limitation was premised on this Court's further observation that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restraction justified by the considerations underlying our penal system." *Price, supra,* 334 U.S. at 285.

The district court concluded that California's limitation of face-to-face meetings between inmates and media representatives resulting from Section 415.071 could be sustained only if it was justified by a compelling state interest. *Hillery v. Procunier, supra,* 364 F.Supp. 196, 201 (N.D.Cal. 1973). Prisoners' activities are, however, necessarily and justifiably subject to limitation due to the considerations underlying the correctional system. Moreover, Section 415.071 does not create a suspect classification or impinge on any fundamental right retained by appellees. Prison authorities must necessarily have the discretion to impose regulations which are rationally related to the justifiable purposes of imprisonment. The district court erred in subjecting Section 415.071 to this searching standard of judicial review.

In *San Antonio School District v. Rodriguez,* 411 U.S. 1, 40 (1973), this Court reaffirmed that the compelling state interest analysis is "reserved for laws that create suspect classifications or impinge upon constitutionally protected rights." Since lawful in-

carceration necessarily brings about the withdrawal or limitation of many privileges and rights (*Price v. Johnston, supra,* 334 U.S. 266, 285 (1948), regulations which apply equally to all persons who, like appellees, are lawfully incarcerated do not create a suspect classification. Similarly, inasmuch as the necessary withdrawal or limitation of rights and privileges is justified by considerations underlying the penal system (*Price, supra,* 334 U.S. at 285), a conclusion that regulation of prisoners' activities necessarily impinges on some fundamental interest is unfounded. In two recent decisions involving the rights of convicted persons and prisoners, this Court limited its inquiry into the validity of the challenged statutes to a determination of whether the distinctions were rationally related to the furtherance of a legitimate objective. *Marshall v. United States,* ..... U.S. ....., 94 S.Ct. 700, 705-706 (1974); *McGinnis v. Royster,* 410 U.S. 263, 270 (1973). This is the appropriate scope of inquiry for all regulations affecting prisoners.

In *McGinnis,* the challenged distinction was the denial of good time credit for pre-sentence incarceration in county jails, and the underlying interest of the prisoner was the establishment of the minimum date on which he would be eligible to appear before the Parole Board. *McGinnis v. Royster,* 410 U.S. 263, 264-267 (1973). This Court of course has recognized "that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on

the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972). Nevertheless, in evaluating the challenged state statute, this Court articulated the limited nature of the review: "We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." *McGinnis, supra,* 410 U.S. at 270.

In *Marshall,* the challenged distinction was the denial of a rehabilitative commitment to a person who had suffered two prior felony convictions, and the underlying interests of the convicted person was the opportunity to be referred to a rehabilitative commitment rather than to a penal institution. *Marshall v. United States, supra,* ..... U.S. ....., 94 S.Ct. 700, 702-703 (1974). Although such a rehabilitative commitment does not offer the same conditional right to liberty afforded by parole, it clearly offers a greater degree of liberty than confinement in a penal institution. Again, in evaluating the challenged federal statute, this Court stated: "The question we are called upon to decide is whether Congress could rationally have assumed that a person, who has committed two or more prior felonies and is an addict at the time sentence is to be imposed is likely to be less susceptible to rehabilitation by reason of his past record, thus posing a greater threat to society upon release." *Marshall, supra,* 94 S.Ct. at 705-706.

The distinctions which were challenged in *McGinnis* and in *Marshall* were in effect distinctions among convicts and prisoners as opposed to distinctions between prisoners and free citizens. *But see Marshall, supra,* 94 S.Ct. at 707. The underlying interests in *McGinnis* and in *Marshall* were the interests in a qualified right to liberty and the interests in a qualitatively distinguishable form of confinement. The appropriateness of the rational basis test for a determination of the validity of regulations drawing such distinctions and effecting such interests indicates that such a test is appropriate for all regulations affecting prisoners.[13] Regardless of whether it would be possible to postulate a regulation affecting all prisoners which would create a suspect classification[14] or impinge on a fundamental interest, Section 415.071 certainly is not such a regulation.

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[13]A reasonableness standard has been invoked by some courts to evaluate regulations which impair the practice of religion (*O'Malley v. Brierley,* 477 F.2d 785, 795 (3d Cir. 1973); *Sharp v. Sigler,* 408 F.2d 966, 971 (8th Cir. 1969) (opinion by Justice Blackmun); *see also Cruz v. Beto,* 405 U.S. 319, 324-326 (1972) (dissenting opinion by Justice Rehnquist)), and which limit social correspondence (*Sostre v. McGinnis,* 442 F.2d 178, 199 (2d Cir. 1971)), and efforts by prisoners to propagandize (*McCloskey v. State of Maryland,* 337 F.2d 72, 74 (4th Cir. 1964); *see also McDonough v. Director of Patuxent,* 429 F.2d 1189, 1193 (4th Cir. 1970)).

[14]In *Lee v. Washington,* 390 U.S. 333, 334 (1968), this Court affirmed a decree which declared that certain state statutes were in violation of the Fourteenth Amendment insofar as they required racial segregation in jails and prisons. Although race is traditionally viewed as a suspect classification, three justices stated: "In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that

Before the strict judicial scrutiny of the compelling state interest test will be applied to a statute which distinguishes individuals or groups of individuals, the statute must totally deny some desired benefit to the members of the class, and as a consequence, the members of the class must suffer a total deprivation of the desired benefit. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 20 (1973); *see also Rosario v. Rockefeller,* 410 U.S. 752, 757 (1973). However, a provision such as Section 415.071 which applies to all prisoners, as opposed to a regulation which pertains to only certain prisoners, is *sui generis* and does not fit within this analysis. *See also San Antonio School District, supra,* 411 U.S. at 18. This Court has recognized "that prisoners necessarily are subject to appropriate rules and regulations." *Cruz v. Beto,* 405 U.S. 319, 321 (1972). Unquestionably, the scope of prisoners' activities which are subject to regulation is necessarily broad. "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done

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state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any delusion of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." 390 U.S. at 334 (concurring opinion). In *Cruz v. Beto,* 405 U.S. 319 321 (1972) this Court confirmed this view, stating, "Moreover, racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.' *Lee v. Washington,* 390 U.S. 333, 334." This suggests that even distinctions based upon race may be valid if they are rationally related to the furtherance of security, discipline, and good order.

under the watchful eye of the State, . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Preiser v. Rodriguez,* 411 U.S. 475, 492 (1973). A regulation which applies to all prisoners does not create a suspect classification.

Moreover, even if the compelling state interest analysis were employed, Section 415.071 still does not create a suspect classification. Section 415.071 does not deny to all prisoners the opportunity to meet face-to-face with representatives of the press; Section 415.071 does not bar press representatives from the state's correctional institutions, nor does it bar inmates in general from being interviewed by press representatives (A. 57-58, 282, 288). Press representatives may tour the institutions and they may interview any inmate on any subject (A. 243-244, 290). If the press representative happens to be familiar with an inmate, he is not precluded from talking to him (A. 259). Likewise, inmates are not precluded from asking the press representative whether he wishes to talk with them (A. 599). If security considerations permit, prison personnel will step aside in order that the interview can be conducted in confidence (A. 244, 300).

Section 415.071 does not prohibit press representatives from gathering information for a story on a specific topic, nor does it bar inmates in general who have information pertaining to the topic from being interviewed (A. 242). If the press representative

wishes to write a story on a specific institutional program, he may sit in on the program and the inmate participants may be interviewed by him (A. 243). Although the press representative may not designate by name a specific inmate to be interviewed, he may designate a group of inmates to be interviewed. For example, when one of California's major newspapers informed the Department that it wished to do a story on the death penalty and wished to obtain the opinions of men who had had a death sentence commuted to a life sentence, the Department supplied the reporters with a list of inmates who were in this category and the reporters then interviewed the inmates (A. 242-243, 289). Similarly, at the time that death row was being phased out at San Quentin State Prison, a television reporter asked to film activities on death row and to speak to inmates whom he might encounter. The television reporter was permitted to conduct this film interview (A. 243). Although a specific inmate cannot demand that he be interviewed by a representative of the press, any inmate who is randomly selected may speak directly with the representative of the press.

Section 415.071 does not deprive any prisoner of an opportunity for direct communications with representatives of the press. By its terms, Section 415.071 applies only to interviews. Throughout the proceedings below, appellants repeatedly pointed out that the Department permitted individual inmates to send letters and manuscripts to media representatives, and that appellees had never alleged that the Department

had in any way interfered with their written communications (A. 14, 18, 47, 120, 199, 274). The pleadings dispel any suggestion that appellees were illiterate and incapable of effectively utilizing such an avenue of communication with representatives of the press. The complaint was filed by appellee Hillery *in pro per* and alleged that he was the owner of two short stories (A. 7). The amended complaint alleged that "[t]he purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter." (A. 23). The amended complaint realleged that inmate Hillery was the author of two short stories (A. 26), and further alleged that appellee Spain "is a talented black writer" and that "[o]ne of his letters has already been published in a recent book, edited by plaintiff PELL, *Maximum Security*, Dutton 1972." (A. 27; see also A. 159-163).

Accordingly, even under the compelling state interest test Section 415.071 does not create a suspect classification. Rather, the determination to limit face-to-face interviews to inmates who are randomly selected represents a policy choice by the Director, who is vested with the authority to make such administrative decisions. Cal. Pen. Code § 5054; *see Marshall v. United States, supra,* ..... U.S. ....., 94 S.Ct. 700, 707 (1974).

Similarly, the strict judicial scrutiny involved in the compelling state interest test is inapplicable as Section 415.071 does not impinge on any fundamental rights retained by appellees. As set forth above, the

physical realities of imprisonment, the purposes to which prison facilities are dedicated, the legitimate exercise by prison authorities of established governmental powers, and the status of a prisoner in relation to the achievement of the legitimate goals of the correctional system warrant the conclusion that the First Amendment does not require that individual inmates have a right to demand and to conduct face-to-face meetings with representatives of the media (*supra,* at 36). Even assuming *arguendo* that some access to representatives of the press is a fundamental right which is retained by appellees, this right can be exercised by directing written communications to the representatives of the press. *Cf. San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 36-37 (1973).

In rejecting a contention that education was a constitutionally protected right, this Court made the following observation: "The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak . . . Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech . . . That these may be desirable goals of a system of free expression . . . is not to be doubted. (Footnote omitted). These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities." *San Antonio School District v. Rodriguez,*

supra, 411 U.S. 1, 36 (1973). Assuming *arguendo* that while prisoners do not retain a right to meet face to face with representatives of the press they do retain a right to some access to the press, it is submitted that this reasoning is equally applicable to any suggestion that written communications to the media or communications to the media through family members, friends, attorneys, or clergymen are an ineffective vehicle for inmate access to representatives of the press.

As Section 415.071 does not create a suspect classification and as it does not impinge on any fundamental right retained by appellees, this is not a case wherein the challenged state action is subject to the strict judicial scrutiny of the compelling state interest test. *San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 40 (1973). Rather, the appropriate inquiry is whether the distinction drawn by Section 415.071 is rationally related to the furtherance of some legitimate consideration underlying our penal system. *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062, 1065 (9th Cir. 1973); *see Price v. Johnston, supra,* 334 U.S. 266, 285 (1948); *McGinnis v. Royster, supra,* 410 U.S. 263, 270 (1973); *Marshall v. United States, supra,* ..... U.S. ....., 94 S.Ct. 700, 705-706 (1974).

In addition to the inappropriateness of the strict scrutiny test, other considerations affirmatively sustain the application of the traditional standard, which requires that the state demonstrate only that its action is rationally related to the furtherance of a legit-

imate state purpose. *Cf. San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 40-44 (1973).

The standard of rationality is peculiarly appropriate when a proper determination must necessarily be based on an informed knowledge of local conditions. *See San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 40-41 (1973). As this Court has recognized, "the relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working and playing are all done under the watchful eye of the State, . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Preiser v. Rodriguez, supra,* 411 U.S. 475, 492 (1973). The adoption of Section 415.071 was preceded by a careful consideration of the alternative solution to the problems facing the Department. Director Procunier repeatedly consulted with his own staff in order to arrive at a solution for controlling the problems which had arisen under the Department's previous interview policy (A. 302). The Department attempted to have a modified version of Section 415.071, but found that it would not work (A. 302); imposition of a selected regulation was rejected as

legally suspect (A. 303). As stated by Director Procunier, Section 415.071 was prescribed as an administrative remedy only "after a great deal of agonizing . . ." (A. 302). In the area of prison administration, where such decisions must necessarily be premised upon an informed knowledge of the conditions existing within the local institutions, local correctional authorities must be permitted to make choices which are dictated by rational considerations.

The standard of rationality is likewise appropriate where the determination must necessarily involve a policy choice in a field which is fraught with uncertainties. *See San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 42-43 (1973); *Marshall v. United States, supra,* ..... U.S. ....., 94 S.Ct. 700, 706-707 (1974). This Court has recognized "that prison officials must be accorded latitude in the administration of prison affairs, . . ." *Cruz v. Beto, supra,* 405 U.S. 319, 321 (1972). The determination of what administrative remedies are necessary in order to maintain the security of correctional institutions and in order to promote the rehabilitation of prisoners is obviously one which is dependent upon expert knowledge, and on which rational persons might disagree. Director Procunier has had approximately 26 years of experience in the field of corrections. With the exception of approximately one year, this experience has been gained as an employee of the California Department of Corrections. Before becoming Director, appellant Procunier held a variety of institutional and departmental positions (A. 122, 280-281). Given

Director Procunier's extensive experience in the field of corrections, it would be inappropriate to restrict his administrative determinations to the strict scrutiny test. Moreover, given the awesome consequences which can flow from a failure to maintain security or to promote rehabilitation, such a limitation could result in unconscionable costs to all concerned. The murder of guards and inmates, the commission of new crimes by released inmates who were not rehabilitated, and the over-crowding of correctional institutions with the resulting heightening of tensions are clearly costs which cannot be tolerated. "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to [correctional] problems and to keeping abreast of ever-changing conditions." *San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 43 (1973).

Finally, "[q]uestions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to vigorous judicial scrutiny." *San Antonio School District v. Rodriguez, supra,* 411 U.S. 1, 44 (1973). As this Court has recognized, "it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez, supra,*

411 U.S. 475, 491-492 (1973). Accordingly, it is appropriate that in reviewing the validity of state regulations pertaining to a state's correctional system, that the inquiry be whether the state regulation bears a rational relationship to the furtherance of a legitimate objective of the penal system.

These considerations further sustain the conclusion that the compelling state interest test used by the district court is an inappropriate standard by which to evaluate Section 415.071. These considerations demonstrate that prison authorities must necessarily have the discretion to regulate an inmate's access to the press and other media by regulations which are rationally related to the justifiable purposes of imprisonment. *Mitford v. Pickett,* 363 F.Supp. 975, 977-978 (E.D. Ill. 1973) *appeal pending*; *Smith v. Bonds,* ..... F.Supp. ....., Civ. 2914 (E.D. N.Car. Mar. 14, 1972) aff'd No. 73-1658 (4th Cir. June 8, 1973); *Seale v. Manson,* 326 F.Supp. 1375, 1383 (D. Conn. 1971).

III

THE LIMITATIONS OF AN INMATE'S ACCESS TO THE PRESS AND OTHER MEDIA TO WRITTEN COMMUNICATIONS AND TO FACE-TO-FACE MEETINGS DEPENDENT UPON THE RANDOM SELECTION OF INMATE INTERVIEWEES IS RATIONALLY RELATED TO THE JUSTIFIABLE PURPOSES OF IMPRISONMENT.

Under the test of rationality, a state provision "must be respected if the 'distinctions drawn have some basis in practical experience' (citation omitted),

or if some legitimate state interest is advanced, (citations omitted). So long as the state purpose upholding a statutory class is legitimate and non-illusory, its lack of primacy is not disqualifying." *McGinnis v. Royster, supra,* 410 U.S. 263, 276 (1973). As prison administration is an area fraught with uncertainties, this Court's admonition in *Marshall* that "options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo,* that judges with more direct exposure to the problem might make wiser choices" is appropriate. *Marshall v. United States, supra,* ..... U.S. ....., 94 S.Ct. 700, 706 (1974). "The Court has frequently noted that legislative classifications need not be perfect or ideal." *Marshall, supra,* 94 S.Ct. at 707. As prison administration is an area which requires determinations based upon expertise and past experience, it is likewise appropriate to note this Court's observation that "[t]he fact that a congressional directive reflects unproven assumptions about what is good for the people, . . . , is not a sufficient reason to find that statute unconstitutional." *Paris Adult Theatre I v. Slaton,* ..... U.S. ....., 93 S.Ct. 2628, 2638 (1973). The Constitution does not preclude states from acting on the basis of past experience and assumptions regarding human behavior "simply because there is no conclusive evidence or empirical data." *Paris Adult Theatre I, supra,* 93 S.Ct. at 2638. Finally, in order for a state provision to be sustained under the rationality test, it is not necessary that the provision be the least restrictive alternative. *San Antonio*

School District v. Rodriguez, supra, 411 U.S. 1, 50-51 (1973).[15]

When these principles are applied to the facts of this case, it can only be concluded that the Department's determination to limit an inmate's access to press and other media to written communications and to face-to-face meetings dependent upon the random selection of inmate interviewees is rationally related to justifiable purposes of imprisonment. It is likewise apparent that the state has a compelling interest in the achievement of these justifiable purposes of imprisonment. Accordingly, even if this were a case which required strict judicial scrutiny, it would have to be concluded that the district court erred in finding that Section 415.071 failed to withstand such scrutiny.

Director Procunier's position is that the Department of Corrections has a dual obligation: first, it must insure that persons who are committed to state institutions are housed securely; second, it must do everything within its power and resources to prepare such persons to return to society (A. 292). The maintenance of security and the fostering of rehabilitation are obviously justifiable purposes of our penal system. *See McGinnis v. Royster, supra,* 410 U.S. 263, 274-276 (1973). It is further submitted that the state has a compelling interest in assuring that these

[15]Even under circumstances where a state is required to select the alternative which is the least restrictive, the Constitution does not require that the state use a cumbersome alternative which would be virtually ineffectual. *Rosario v. Rockefeller,* 410 U.S. 752, 762 n. 10 (1973).

dual objectives are fulfilled. It is readily apparent that the failure of security can result in serious loss of life within the institutions (*see* A. 256). It is likewise readily apparent that a failure in rehabilitation could result in deferring release of prisoners and thus producing over-crowded conditions or it could result in premature release resulting in new crimes in society. This latter possibility would necessarily lead to further burdens upon the judicial process and further over-crowding within correctional institutions. In short, the failure to achieve these objectives could lead to an unending and ever-expanding cycle of crime with all its collateral costs to society.

The Department's decision to adopt limitations regarding inmate interviews with the press and other media was prompted by a tragic occurrence during which three staff members and two inmates were killed, and was premised on a judgment that the Department's former practice had adversely affected prison security and the rehabilitation of inmates, and had imposed serious burdens on the correctional officers (A. 287-288, 292-293, 296-297). *Hillery v. Procunier, supra,* 364 F.Supp. 196, 198 (N.D.Cal. 1973). Prior to settling upon the policy of Section 415.071, the Department had permitted named inmates to be interviewed by accredited representatives of the news media (A. 282, 286). Certain named inmates became the subject of extensive press coverage. For example, one inmate held 66 interviews over an 18-month period (A. 297). Another inmate, who subsequently was killed during the escape attempt of August 21, 1971,

held 33 interviews from August of 1970 through June of 1971 (A. 285-286). Partially as a result of the extensive press attention, this inmate became, in effect, a public figure (A. 285). This inmate utilized his frequent contact with the press as a vehicle for reaching dissident inmates. His message to such inmates was essentially that the manner in which to alter the correctional institution was to be non-cooperative, and that any cooperation would serve to perpetuate the correctional system (A. 287).

The Department determined that an augmentation of disciplinary problems within the institution was in part the result of the expansive press coverage which was being afforded to inmates who advocated a policy of non-cooperation (A. 287-288). It was the Department's opinion that in terms of management principles, these were destructive messages (A. 287). It was believed that the security risk imposed by an inmate was increased as press coverage of the inmate increased (A. 263).

The Department viewed the tragic events of August 21, 1971, as partially attributable to the extensive press attention which had been afforded to one of the inmates who had been killed on that day (A. 249). The Department's concern was that the extensive press exhibition afforded to this inmate had served to magnify his negative leadership role, and to influence other inmates to adopt an attitude of non-cooperation (A. 287). The Department believed that the extensive press coverage had created in this inmate a false sense of status, and had conveyed to

other inmates who were confined in the same lock-up unit with him a false perception of him, and that this had contributed to the tragic occurrences of August 21 (A. 255).

One of the major considerations which led Director Procunier to conclude that a modification of policy was essential was the adverse effect which the Department's unrestricted interview policy was having on the Department's ability to rehabilitate inmates (A. 292-293). As a result of years of experience, Director Procunier and his staff had concluded that before an inmate makes any kind of a change, there must first be a change in his attitude (A. 292). As stated by Director Procunier "[i]f a man is encouraged by increased notoriety and this encourages others to pursue the same thing, their attitude is such that we can't deal with them in a constructive way." (A. 292-293). The Department felt strongly that the extensive press coverage afforded to an inmate who espoused the practice of non-cooperation encouraged other inmates to adopt this attitude and impaired the Department's efforts to deal with the inmates in a constructive manner (A. 292-293).

The Department was also concerned with the time and effort which was involved in escorting inmates and newsmen under the unrestricted policy (A. 247). If an inmate was in lock-up status, a half-day of employee time was necessary in order to hold an interview of one hour or less (A. 296-297). As approximately 20,000 convicted felons are currently housed in the state's institutions (A. 281-282), the

potential administrative burden on the unrestricted policy is staggering. If only 10 per cent of the inmates held semi-annual interviews, the Department's staff would be required to arrange some 4,500 interviews (A. 130). Due to the wide coverage afforded an inmate under the unrestricted policy, the Department also found that it would be administratively impossible to review all incoming publications which covered the interviews (A. 286-287).

The Department's decision to alter its unrestricted policy regarding inmate interviews was thus premised on its determination that the unrestricted policy impaired the Department's ability to fulfill its dual obligations to maintain security and to foster rehabilitation, and imposed a serious burden on the administration of the state correctional facilities (A. 286-288, 292-293, 296-297). Section 415.071 was prescribed as an administrative remedy only "after a great deal of agonizing . . ." (A. 302). Its adoption was preceded by careful consideration of alternative solutions to the problems facing the Department. Director Procunier repeatedly consulted with his own staff in order to arrive at a solution for controlling the problems which had arisen under the Department's previous interview policy (A. 302). The Department attempted to have a modified version of Section 415.071, but found that it would not work (A. 302); imposition of a selective regulation was rejected as illegally suspect (A. 303).

It is apparent that the source of the various problems which had arisen under the unrestricted policy

was that under such a policy specific individual inmates could become the subject of extensive press coverage (A. 249). Section 415.071 is a narrow and precise regulation which eliminates this problem. Section 415.071 provides only that "Press and other media interviews with specific individual inmates will not be permitted." As found by the district court, "[t]he regulation does not effect an absolute ban on all media interviews with inmates." *Hillery v. Procunier, supra,* 364 F.Supp. 196, 199 (N.D.Cal. 1973).

In summary, an unrestricted interview policy will impair the Department's ability to maintain security and promote rehabilitation, and will impose serious administrative burdens on the administration of correctional facilities. Specific individual inmates have no enforceable right to monopolize press attention and to thereby impair the Department's ability to fulfill its dual obligation. As Section 415.071 serves to preclude the recurrence of such situations, it must be concluded that it is rationally related to the furtherance of the state's compelling interest in preserving security and fostering rehabilitation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order of the district court granting appellees' summary judgment and declaratory relief and enjoining the enforcement of Section 415.071 of the California Department of Corrections Manual be reversed.

Dated, February 25, 1974.

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IN THE

Supreme Court of the United States

October Term, 1973

~~73-~~ **No. 918**

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPELLANTS' BRIEF

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October Term, 1973

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APPELLANTS' BRIEF

Opinion Below

The decision and opinions of the three-judge district court are reported at 364 F. Supp. 196 and are reproduced in the Appendix hereto, referred to as "App. _____".

Jurisdiction

The jurisdiction of this Court to review a decision of the specially constituted district court is based on 28 U.S.C. § 1253 and 2101(b). The judgment of the district court was entered on August 16, 1973, a notice of appeal to this Court was filed on October 11, 1973, and this Court noted probable jurisdiction on January 21, 1974, consolidating this case with *Procunier v. Hillery*, No. 73-754.

State Provision Involved

California Department of Corrections Manual Section 415.017:

> "Press and other media interviews with specific individual inmates will not be permitted."

Questions Presented

1. May California impose a total and inflexible ban on press interviews with specific individual inmates in all of its prison camps, minimum-security institutions, work-release programs, and other institutions, even though many other members of the public are allowed such interviews?

2. Does the press have a First Amendment right of access in order to gather news?

3. Are the rights of the press adequately protected by the press-inmate contacts that California does allow?

4. Did the district court correctly conclude that California had not shown such harm from press interviews with specific individual inmates, as to meet the "compelling state interest" and "least drastic alternative" tests required by the First Amendment?

Statement of the Case

Proceedings

On November 8, 1971, Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that defendant-appellees Procunier, Nelson and Park, all officials of the California prison system,* were denying him an interview with the editors of Earth Magazine. An order to show cause was issued by a single-judge district court and on January 13, 1972, appellees filed a return. On March 8, 1972, a first amended complaint for damages and declaratory and injunctive relief was filed.

The amended complaint added as plaintiffs three inmates John Larry Spain, Bobby Bly and Michael Shane Guile, and also appellants Eve Pell, Betty Segal and Paul Jacobs; it also added as a defendant the appellee Joseph O'Brien. The new pleading alleged the original claim of Hillery and further alleged that Eve Pell was a freelance author who had been denied a request to interview Spain about prison conditions; that Betty Segal was a newspaper reporter who had been denied a request to interview Bly about a law suit he had filed challenging prison conditions; and that Paul Jacobs was a television reporter, author and editor, who had unsuccessfully sought permission to interview Guile about racial tensions in prison. The amended complaint "sought to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel."

* Appellees are Raymond K. Procunier, Director of the California Department of Corrections; Louis S. Nelson, Warden of the California State Prison at San Quentin; James W. L. Park, former Associate Warden of the California State Prison at San Quentin; and Joseph R. O'Brien, former Public Information Officer at the California State Prison at San Quentin.

On April 6, 1972, defendants moved to dismiss the amended complaint and brought § 415.017 to the court's attention. On September 29, 1972, the single-judge district court issued an opinion and order declaring Section 415.071 invalid as a violation of the First Amendment. The Court permanently enjoined the enforcement thereof and directed defendants to submit a proposed new rule consistent with the opinion. On October 4, 1972, defendants filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and the plaintiffs did not oppose the motion. On November 1, 1972, the September 29 opinion and order were therefore set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.*

The matter was heard before the three-judge district court on February 24, 1973, and some testimony was taken on behalf of the defendants. After the filing of additional memoranda by the American Civil Liberties Union, *amicus curiae*, and by defendants, the matter was submitted.

Facts

The opinion of August 16, 1973, sets forth the facts about which there is no significant dispute. The district court found that prior to the late 1960's, interviews between prisoners and the press were relatively infrequent. However, the number of requests for such interviews increased substantially, with the rise of discontent within the prisons and the consequent increase in public concern and interest.

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* Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were tentatively approved by the single-judge court on February 8, 1973. These are referred to as Regulation 72/40 and are reprinted in the Joint Appendix 104.

On August 21, 1971, three San Quentin staff members and two inmates were killed in an incident involving inmate George Jackson. Although prison officials attributed this incident to press interviews and thereupon promulgated § 415.071, the district court found, after taking testimony, that there was no evidence of a "direct relationship" between press interviews and prisons violence. App. 45-47. With respect to these particular plaintiffs, the Court specifically found that neither the inmates nor the journalists posed security problems. *Id.* at 31. Nor, according to the Court, was there evidentiary support for any claim that the press interviews would create any other interference with legitimate state interests, such as administrative efficiency and rehabilitation. The district court therefore struck down the regulation on the ground that it interfered with the prisoners' rights under the First Amendment, while noting that reasonable limitations as to time, place and manner were appropriate, and that if a particular interview were shown to pose a clear and present danger to prison security, it could be denied.

Despite the above findings and conclusions, the district court read *Branzburg v. Hayes*, 408 U.S. 653 (1972), and *Seattle-Tacoma Newspaper Guild v. Kleindienst*, 480 F.2d 1062 (9th Cir. 1973), as precluding a First Amendment right in the press to interview specific individual inmates. It therefore dismissed the press-appellants' claims.

Defendants filed a notice of appeal and a jurisdictional statement, and this Court noted probable jurisdiction thereof on January 7, 1974 *sub nom. Procunier v. Hillery*, No. 73-754. On October 11, 1973, the press-appellants filed a notice of appeal, and thereafter filed their jurisdictional statement. On January 21, 1974 this Court noted probable jurisdiction *sub nom. Pell v. Procunier*, No. 73-918, and consolidated the two appeals.

Summary of Argument

1. In August 1971, defendant Raymond Procunier suddenly reversed a long-standing policy in California, and banned all press interviews with specific individual inmates. The ban applied throughout California's twelve correctional institutions, no matter how mild, well-behaved and obscure the prisoner, no matter how minimal the security of the particular institutions and regardless of any other circumstances. The three-judge district court unanimously found that this universal and inflexible ban violated the First Amendment rights of California prisoners and was not justified by security, administrative or rehabilitative considerations. The court nevertheless concluded that *Branzburg v. Hayes*, 408 U.S. 665 (1972) had denied the press a "special newsgathering privilege" beyond that of the "average citizen," App. 34-35 and therefore the press had no First Amendment right of access to interview specific inmates.

The district court decision misconstrued both the press-appellants' claim and the decision of this court in *Branzburg*. The press-appellants are seeking not "special" privileges, but visiting rights that are available to family, clergy, attorneys, and many others every day in the year. Moreover, *Branzburg* did not hold or even say that the press has no particular newsgathering rights, but only that where the "public generally" cannot go, such as a grand jury, closed legislative sessions, etc., the press may not go either. Indeed, *Branzburg* quite clearly recognized that newsgathering is entitled to First Amendment protection, as have numerous decisions before and after that decision.

Nor are the press-appellants seeking an "unrestrained right to gather information," *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), but one that truly accommodates the needs of both the First Amendment and the prison system.

2. The burden imposed by the California regulation on the press is very severe, regardless of other means of inmate-press contact; the burden remains very heavy even if the Court affirms the district court's ruling in favor of the prisoners' First Amendment rights.

a. Numerous decisions, including the court below, have found, after much testimony, affidavits, and other forms of proof, that there are no adequate substitutes for face-to-face interviews with specific individual inmates. See, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Hillery v. Procunier*, 364 F. Supp. at 200-01; *Washington Post Co. v. Kleindienst*, ____ F.2d ____, No. 72-1362, slip op. 10-13 (D.C. Cir. 2/21/74), *aff'g* 357 F. Supp. 779, 781 (D.D.C. 1972) (and see Fact Findings 24-26 in the *Washington Post* case, reprinted in the Appendix C to this brief); *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. 719, 730 (S.D. Tex. 1973); *Burnham v. Oswald*, 342 F. Supp. 880, 885 (W.D.N.Y. 1972); *McMillan v. Carlson*, ____ F. Supp. ____, No. 72-2551-M (D. Mass. 12/31/73); *Globe Newspaper Co. v. Bork*, ____ F. Supp. ____, No. 73-3748-G, memo op. 8 (D. Mass. 1/12/74).

b. Nor can the press rely on the prisoners' rights of free expression. In many cases, the prisoners may be fearful of exercising those rights in the coercive setting of the prison; in other cases, the prisoner may have no great interest in initiating an interview. Indeed, defendants' own public information officer testified that he had "never really dealt with an instance in which an inmate has asked to be interviewed." Joint App. 248, 258.

3. The district court offered no justification for the denial of a press right of access other than its construction of *Branzburg v. Hayes*, but rather rejected all of defendants' justifications when it upheld the inmates' right of expression. These latter findings were clearly correct.

a. No serious burden can be imposed on the First Amendment rights involved herein without a showing of both a compelling state interest and the absence of less drastic alternatives. The district court correctly found that no such showing had been made.

b. Security considerations do not justify a universal and inflexible ban on press interviews with specific individual inmates, at any time, under any circumstances, in any type of institution. Such a ban is especially unnecessary here, where the district court explicitly found that neither the particular press-appellants nor inmate-plaintiffs pose security problems. The regulation is thus overbroad.

c. Administrative convenience is not a significant factor, for relatively few interviews are involved, and appropriate regulations can be devised.

d. Many, many other jurisdictions allow press interviews, and apparently without any serious problems of any kind.

e. Indeed, defendant Procunier himself testified in the *Washington Post* case that he would prefer a flexible approach, but his lawyers told him that such an approach would create legal problems. Joint Appendix 301-03; see also *Washington Post Co. v. Kleindienst*, 357 F.Supp. 770, 774 (D. D.C. 1972), *aff'd*, ____ F.2d ____, No. 72-1362 (D.C. Cir. 2/21/74). Defendant Park has similarly urged the value of press-prisoner interviews. Park, *On Being Medium Nice to Prisoners*, [1973] WASH.U.L.Q. 607, 615. as have other experienced correctional administrators like Maurice Sigler, Chairman of the Federal Parole Board and former President of the American Correctional Association. Virtually all commentators agree.

4. If improvements in our seriously deficient penal system are to be made, then we must have an aggressive press investigating prison conditions and able to talk to specific inmates.

ARGUMENT

Introduction

From the founding days of the Republic to the present, the newsgathering function of the press has been the lifeblood of a free society. Madison and Jefferson repeatedly insisted that our survival as a free society depends on "popular information . . . [and] the means for acquiring it."* Francis Lieber, the nineteenth century American political theorist, wrote: "The journals are to the modern freeman what the agora was to the Athenian, the forum to the Roman."** Today, more than ever, the newsgathering function has been proved vital to the continued health of our political and social institutions.

Nowhere is this function more crucial than to our prison system. For too long, prisons have remained on the dark side of our society, unknown and uncared about. Inefficiency, cruelty, waste—all were common and have now come to light in a tragically bloody manner. Now, however, the community has begun to wonder about where its tax dollars are going and what good they are doing. To this increasing community concern, the press has contributed heavily, with news and feature stories, descriptions

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* 6 WRITINGS OF JAMES MADISON (Hunt ed. 1906) ("A popular government without popular information or the means for acquiring it is but a prologue to a farce or tragedy or perhaps both"); XII PAPERS OF THOMAS JEFFERSON (Boyd ed.) 48-49.

** *On Civil Liberty and Self-Government* (1853), reprinted in Nelson (ed.), FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 377, 378 (1967).

of prison conditions, and interviews with specific inmates. Most prison administrators formerly prohibited such interviews, but now that has changed, and many, if not indeed most, prison administrators allow such interviews.

This case raises the question of whether the State of California can turn the clock back and shut out effective press coverage of what is happening in its penal system.

I. The press-appellants are seeking only the kind of reasonably regulated access to specific individual inmates that is presently available to family, attorneys, clergy and many others.

It is important to note that the district court presented no policy or other considerations for its denial of press access rights—it relied solely on its construction of *Branzburg*. Nor could it have done otherwise for in the inmate-rights part of its opinion, it effectively demolished all the security, administrative and other arguments offered by defendants. If the inmates' part of the opinion is correct, the only question is the district court's construction of *Branzburg*.

A. The district court misconstrued the basis of press-appellants' claim

The district court read *Branzburg v. Hayes, supra*, as denying "newsmen special news gathering privileges." App. 34-35. "The press," held the district court "enjoys no greater right to access to news sources than the average citizen." *Ibid.* 34-35.

Regardless of the validity of the latter point in other contexts, see Point II below, here the press-appellants are not seeking "special" rights unavailable to "the average

citizen," but only those which are already available to vast numbers of average citizens. For California permits visits and interviews with individual specific inmates by huge numbers of people: family, clergy, attorneys, social workers, and many others,* Joint App. 262-63, as do all other prison systems. Indeed, it allows "special purpose visits" to specific inmates on an individual basis even for people without such relationships, depending on the purpose of such a visit. *Ibid.* All are, of course, subject to reasonable security and other regulations, as would be those sought here.

Admittedly, each of these visiting groups has some kind of more than "average" interest that makes a visit necessary, but so does the press—the latter has a high First Amendment interest to promote the community's right to know what is going on in governmental institutions. See, *e.g.*, *Branzburg v. Hayes*, 408 U.S. at 681, 704-05; *Kleindienst v. Mandel*, 408 U.S. 753, 763-65 (1972); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971); *Associated Press v. KVOS*, 80 F.2d 575 (9th Cir. 1935) rev'd on other grounds, 299 U.S. 269 (1936); *Kovach v. Maddux*, 238 F.Supp. 835 (M.D. Tenn. 1965) (reporter unconstitutionally excluded from State Senate floor). *Cf. Lewis v. Baxley*, ___ F.Supp. ___, 42 U.S.L.W. 2347 (D. Ala. 1973) (3-judge court). Where there are so many exceptions to a general ban, excluding the press wrongly discriminates against them and the constitutional interest they represent. Indeed the First

* Apparently including just friends. See Joint App. 269.

Amendment actually grants them a *preferred* status, and discriminations which heavily burden First Amendment values are especially reprehensible, as this court and others have consistently held. *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 100-01 (1972); *Niemotko v. Maryland*, 430 U.S. 268 (1951); *Adams v. City of Park Ridge*, 293 F.2d 585, 589-90 (7th Cir. 1961); *Providence Journal v. McCoy*, 94 F.Supp. 186, 194 (D. R.I. 1950), *aff'd*, 190 F.2d 760 (1st Cir. 1951) (records available to others cannot be denied to press); *Consumers Union v. Periodical Corr. Ass'n*, 365 F.Supp. 18 (D. D.C. 1973) (one reporting group may not be excluded from press association).

Many of the numerous cases striking down no-access rules in prisons like that at issue here, have made the same point. See *Washington Post Co. v. Kleindienst*, ____ F.2d ____, No. 72-1362 (D.C. Cir. 2/21/74) ("the right of access of the press to report an event is customarily as broad as the general public's access to it. *Estes v. Texas*, 381 U.S. 532, 540 (1965)" slip op. 9); *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. 719, 725 (S.D. Tex. 1973); *Globe Newspaper Co. v. Bork*, (memo op. 11).

Nor is there any particular reason to single out the particular plaintiffs here. The district court found—and this was undisputed—that "none of the prisoner plaintiffs has been alleged by the defendants to have presented security problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks." App. 31. All that plaintiffs seek is what many others already have, and solely in order to fulfill a basic First Amendment need—to provide the community with information about prison conditions.

Finally, it must be stressed that the press is not seeking an "unrestrained right to gather information," as the dis-

trict court implied. Reasonable regulations as to time and place, and special limitations where there are specific security risks, are obviously in order and the press does not seek otherwise. *Washington Post Co. v. Kleindienst,* ___ F.2d ___ No. 72-1362, slip op. 23; Compare *Burnham v. Oswald,* 333 F.Supp. 1128 (W.D.N.Y. 1971) (post-Attica emergency) with 342 F.Supp. 880 (W.D.N.Y. 1972); *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062, 1064 (9th Cir. 1973) (regulation appropriate for maximum security institution on "heels of riot," see App. 46). Where there are individual problems they can be individually handled. See *Seale v. Manson,* 326 F.Supp. 1375, 1383 (D. Conn. 1971) (particular prisoner's notoriety justified some limits on press access to him; App. 46).* It is the rigid universality of defendants' ban on press interviews with specific inmates, when exceptions are made for others with no higher interest, of which the press complains in this Point.

II. The press has a First Amendment right to gather news in order to meet a democratic society's need to know.

A. The press has a unique watchdog function.

Even if few or no others were allowed in prison, however, the press would still be entitled to access because "the function of the press is unique." *Globe Newspaper Co. v. Bork,* memo op. 8.

The press's watchdog function is indispensable to representative government. In 1800 Tunis Wortman wrote profoundly and at length about the special role of "political

* This is not to say that press-appellants agree with the specific rulings in the cited cases. They do, however, illustrate the principle that discretion is feasible.

Investigation" in representative government. Exercise of the franchise, continuing scrutiny of public officials, candidacy for public office—"the Representative System unavoidably implies an absolute right to investigate the conduct of all public officers . . ." Wortman, *A Treatise Concerning Political Inquiry*, (1800) reprinted in LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 267 (1966). And for this purpose, a free press is indispensable to a representative government. "Ambition cannot fail to dread that vigilant guardian of Public Liberty whose eye can penetrate and whose voice be heard in every quarter of the State." *Id.* at 273. Indeed, some students have concluded that "the driving force behind the First Amendment was primarily the desire to check possible abuse of government by preserving an untrammelled press . . ." See, *e.g.*, Note, *Access to Official Information: A Constitutional Right*, 27 Ind. L. J. 209, 218 n.35 (1952). As Judge McGowan put it in the *Washington Post* case: "The First Amendment rights of the press are, of course a function of the paramount right of the public to information necessary to enable it to assert ultimate control over the political process." Slip op. 7.

This Court and other institutions have frequently recognized this "unique" watchdog role of a free press. See, *e.g.*, the many cases cited at p. 11 above, including *Branzburg v. Hayes* and *Kleindienst v. Mandel*. Note, *Reporters and Their Sources*, 80 YALE L. J. 317, 326-29 (1970).

Other agencies of government recognize this as well. Press galleries and special privileges are provided in recognition of its special role. See, *e.g.*, *Kovach v. Maddux*, *supra*; *Consumers Union v. Periodical Correspondents Ass'n.*, *supra*. The press will often be allowed in courtrooms when the general public is not. See, *e.g.*, Lubasch,

Trial of Mitchell and Stans Starts Here Today, N.Y. Times, Feb. 19, 1974, p. 14, col. 2 (city ed.) (during jury selection period, public was barred because of space shortage, but press had a 10-member pool present).

B. The press' watchdog function is especially vital with respect to prisons

The press has an especially "invaluable watchdog function with respect to prisons, whose very nature imbues the press function with heightened significance in comparison to other, more open institutions." *Globe Newspaper Co. v. Bork*, memo op. 8; *Burnham v. Oswald*, 342 F.Supp. at 886; *cf. Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973) (invisibility of most prison decision-making deplored).

Defendant Procunier himself seems to recognize this. In his *Washington Post* testimony which he introduced in this proceeding, he indicated that he would have *preferred a* flexible rule as suggested by Judge Gesell in their colloquy, but his lawyers told him he could not do so legally. Thus, he testified:

> The Witness: My attorney suggested to me—we were thinking along the same lines you are suggesting [*i.e.*, a flexible rule]—that I had to make it apply to everyone or I would not be allowed the prerogative that you suggest here. That is the only reason I have it across the board.
>
> The Court: In other words, as a correctional matter, putting aside legal considerations, you would tend to want to make the non-interview thing selective also?
>
> The Witness: Yes, sir.
>
> The Court: And it is because of legal considerations that you put it across the board?
>
> The Witness: Yes, sir.

See Joint App. 303; for a fuller discussion of this point, see *id.* at 301-02.

This point was duly noted by the district court in the *Washington Post* case in its conclusion that "were" it not for questionable legal advice [Mr. Procunier], "would still permit interviews in many sectors of his statewide correctional system." 357 F.Supp. 770, 774 (D.D.C. 1972), *aff'd.* ___ F.2d ___, No. 72-1362 (2/21/74).

Another defendant in this case, Mr. Park, is apparently of a similar mind. Thus, he recently wrote:

> "A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, *On Being Medium Nice to Prisoners* [1973]WASH. U. L. Q. 607, 615.

Other prison administrators agree. The Chairman of the Federal Parole Board and former President of the American Correctional Association Maurice Sigler declared recently:

> "The media can be an enormous asset to corrections, and it often has been. It is for the most part committed to correctional improvement, and it has been most vocal in this respect during the past year. Reporters should be invited to look over our programs, our activities, and our facilities. *They ought to be able to talk to any of our clients.* Sometimes they won't be told the truth. Sometimes they will be misled. But in time, as they gain understanding, they will be able to do a better job of separating fact from fiction." Sigler, *New Partnership in Corrections*, 12 CrL 2042, 2043 (10/11/72) (emphasis added).

It is thus no accident that almost all commentators similarly oppose the kind of ban imposed by defendants. See, *e.g.*, Corrections Standard 2.17, National Advisory Commission on Criminal Justice Standards and Goals (1973), and Commentary, *id.* at 68; Recommendations of the Association of State Correctional Administrators reported in Comment, *A Prisoner-Press Interview Right*, 11 Am. Cr. L. Rev. 273, 288 n. 73 (1972); NCCD, Model Act for the Protection of Rights of Prisoners § 7, discussed in *Washington Post* Finding of Fact 58; Model Rules and Regulations ID-10, pp. 75-76 (West Pub. Co. 1973) (adopted in Massachusetts).

For this reason, almost all the cases that have recently grappled with this problem have come out the same way. See, *e.g.*, *Washington Post Co. v. Kleindienst, supra; Globe Pub. Co. v. Bork, supra; Houston Chronicle Pub. Co. v. Kleindienst, supra; Burnham v. Oswald*, 342 F. Supp. 880. Only *Mitford v. Pickett*, 363 F. Supp. 975 (E. D. Ill. 1973) and *Smith v. Bounds*, ____ F. Supp. ____, Civ. 2914 (N. D. N. Car. 3/14/72), *aff'd*, 73-1658 (4th Cir. 6/8/73) seem to uphold a total ban.* As noted, *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973) was explicitly limited to a maximum security institution like McNeil Island, *id.* at 1067, see the opinion below in App. at 46, and *Washington Post Co. v. Kleindienst*, slip op. 21 n.21; and *Seale v. Manson*, 326 F.Supp. 1275, 1283 (D. Conn. 1971) involved a specific application of a flexible rule, as did *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (Ct. App. 1 1972).

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* As the inmate-appellees in No. 73-754 noted in their Motion to Affirm or Dismiss, the North Carolina system shortly thereafter decided to permit press-inmate interviews, despite the decision in their favor.

C. *Branzburg v. Hayes* does not mandate a different result.

The district court, following *Seattle-Tacoma Newspaper Guild v. Parker,* relied on *Branzburg v. Hayes, supra.* Such reliance was unwarranted. Note, *Public and Press Access Rights to Prisoners after Branzburg and Mandel,* 82 YALE L. J. 1337, 1342 n. 36 (1973). *Branzburg* explicitly denied that "newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U. S. at 681. At the close of the opinion, the Court reiterated that "news gathering is not without its First Amendment protections." *Id.* at 707; see Note, 82 YALE L. J. at 1346. Mr. Justice Powell, in his concurrence, drove the point home by stressing the First Amendment's protection for news-gathering. *Id.* at 709. See also the views of Mr. Justice Stewart, *id.* at 728 n. 4 and 727; and the views of Mr. Justice Douglas, *id.* at 715.

Branzburg did not even address itself to the kind of problem at issue here. As the Court noted not once, but several times, the sole issue in the case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.* at 667; see also *id.* at 682 ("the *sole* issue before us is the obligation of reporters as other citizens to respond to grand jury subpoenas relevant to an investigation into the commission of crime" [emphasis added]). And it refused to create such a privilege where the effect of such denial on newsgatherings was "uncertain" and "speculative," *id.* at 690, 694; as will be argued below, the effect of the ban here is very great. Moreover, the benefit to newsgathering from the privilege claimed in *Branzburg* was deemed equally uncertain. *Id.* at

695. And most importantly, the countervailing interest was one of those most consistently protected by this Court—the power of the grand jury to seek out crime. See *United States v. Calandra*, ____ U. S. ____, 14 CrL 3061, 3063 (Jan. 8, 1974). Here, however, the district court found no such countervailing interest.*

Moreover, in *Branzburg*, this Court noted that its "conclusion itself involves no restraint on what newspapers may publish or on the *type or quality* of information reporters may seek to acquire. . . ." 408 U. S. at 691 (emphasis added). Yet, as the district court found, the "type or quality" of information available to the press will be sharply diminished if face-to-face interviews are not allowed, App. 37-39, and many other courts have similarly concluded. And although this case does not involve a direct prior "restraint on what newspapers may publish," compare *Near v. Minnesota*, 283 U. S. 697 (1931), defendant's ban has the same effect by choking off one of the very few reliable and useful sources of a particular kind of news. As was said in the *Washington Post* case, "excessive limitations on the ability to gather information would render the freedom to publish a hollow guarantee." Slip op. 8. See also *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. at 730. Compare *Schneider v. State*, 308 U. S. 147 (1939).

This latter problem is aggravated by the fact that the defendants and other California prison administrators have steady and easy access to the press. Philip Guthry, the

* Non-prison cases interpreting *Branzburg* as limited to grand jury situations where the consequential burden is slight include *Baker v. F&F Investment Co.*, 470 F.2d 778 2d Cir. 1972); *U.S. v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) (Leventhal, J., concurring); *U.S. v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1971); *Cervantes v. Time, Inc.*, 464 F.2d 987, 993 n.10 (8th Cir. 1972); *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal 1972).

California Information Officer, testified that the "press has virtually unlimited access to employers and administrators." Joint App. 241. He answers hundreds, maybe thousands, of inquiries from the press, generally reflecting not the prisoners' viewpoints, but the administrators'. *Id.* at 252. When a strike recently occurred, there were twenty news inquiries, "but no prisoners were allowed to talk during the course of the strike," *id.* at 261, and the administrators told the newsmen "what's going on." *Ibid.*

This is not to say that reporters should have access everywhere and at all times. Proceedings that are secret or otherwise kept from the general public may be covered by *Branzburg*, see 408 U. S. at 684-85, *cf. Lloyd v. Tanner*, 407 U. S. 551 (1972), but surely not places open to "hundreds" of people daily, with 10,000 visitors a year at San Quentin alone. App. 43.

III. The restriction imposed on the press by § 415.071 is very severe.

The district court concluded that "whatever rights the press may have with respect to interviews with inmates" were sufficiently protected by the rights afforded the prisoners and by the right of random access. App. 7, 8.

As to "random access," each court that has dealt with this problem particularly those that have considered the virtually identical federal rule,* has concluded that random access is inadequate. See cases cited at p. 7, *supra*, especially *Washington Post Co. v. Kleindienst*, slip op. 11-12.

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* Contrary to the district court's unfounded belief that the *Washington Post* case involved a more stringent rule, see App. 35, 36, the federal and California rules are identical, and defendant Procunier so testified in the *Washington Post* case. See Joint App. 288.

Nor will protection for the inmates' rights of expression enable the press to fulfill its newsgathering duties. In the first place, there may be instances where the inmate has no particular interest in seeking out the press because he is indifferent about whether others obtain his information, though he will disclose it if asked. See, *e.g.*, *McMillan v. Carlson, supra* (inmate has information about James Earl Ray's early life).

Even more importantly, many inmates are afraid to take the initiative to seek interviews, to call attention to themselves. This was implicitly confirmed by Mr. Guthry who "never dealt with an instance in which an inmate has asked to be interviewed." Joint App. 248, 258. Warden Nelson responded to an Interrogatory on the subject with "Requests by prisoners for interviews with the media are rare, and some are recalled." Interrog. 4, in Joint App. 53-54; see also the opinion below in App. at 41, 42. And since both the defendants and the court below interpret the court's ruling as requiring the inmate to take the initiative in order for the inmate to exercise his right, see jurisdictional statement in No. 73-754 at 8-9, and pp. 46-47 of the record of Feb. 14, 1973 hearing (Judge Williams' comments), press-inmate interviews will take even more courage on the inmate's part.

Moreover, there are indications that the final regulation will be something like Reg. 72/40, the interim regulation reprinted in Joint App. 104. If so, it will be particularly difficult for the press to obtain information, for that regulation is geared entirely to an inmate's right to expression. Thus, interviews are allowed only once every six months; no interviews are allowed if the inmate is in solitary confinement (in order to punish him); only the inmate can appeal a disapproval of an interview, thus requiring him to over-

come a fear of reprisals. See generally the November 1972 affidavit of defendant Procunier, printed in Joint App. at 122-31.

Nor will mail help very much, as so many courts have found. Many inmates have poor literacy or other language problems, and have great difficulty expressing themselves on paper. Indeed, virtually all the cases striking down press access rules have found that face-to-face interviews are essential, as did the district court herein. App. 35-36. See also, *Washington Post Co. v. Kleindienst*, slip op. 11; *Burnham v. Oswald*, 342 F. Supp. 885 ("there are many prison situations which can only be explored fully and accurately by face-to-face interview"); findings 20-28 to *Washington Post Co. v. Kleindienst*, 357 F. Supp. at 786, reprinted in App. C. And in another context, this Court has come to the same conclusion, *Kleindienst v. Mandel*, 408 U. S. at 765.

IV. Defendants have presented no justification that meets the heavy burden imposed on any significant restriction on First Amendment's freedoms.

Because the district court's dismissal of the press-appellants' claims was based almost entirely on its construction of *Branzburg*, it explored virtually no penological or other relevant factual considerations. Those considerations are no different, however, from those so carefully and painstakingly analyzed by the district court in its discussion of the inmates' rights, and totally rejected; the anomalousness of the district court's divergent rulings in this case has been noted and criticized. Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L. J. 1337, 1342 n. 36 (1973).

Because of the applicability of defendants' arguments on this score to the press-appellants' claims, those arguments will be analyzed here, though relatively briefly since they will be treated extensively in No. 73-754.

A. Defendants carry a heavy burden of showing that they have adopted the least drastic alternative in order to meet a compelling state interest.

It seems almost beyond dispute that First Amendment freedoms can be restricted only if there is a compelling state interest involved, and the least drastic alternative has been chosen. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). And limitation must be on "an individualized basis, not by means of broad classifications." *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 101 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); *Washington Post Co. v. Kleindienst*, slip op. 13, 14, 21; *Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1971). Here, the most drastic alternative has been chosen, and on the broadest of classifications.

Indeed, the total and universal ban adopted by defendants in order to deal with a small number of problem situations raises serious problems of overbreadth. It ignores the requirement laid down by this Court that "justifiable government goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. at 680-81. As the Court pointed out in *N.A.A.C.P. v. Button*, "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching out most precious freedoms." 371 U.S. at 438. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Compare *Schneider v. State*, *supra*.

Defendants apparently plan to argue that the appropriate test is the "rational classification" criterion. But as the Second Circuit said in *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied, sub nom. Oswald v. Sostre*, 405 U.S. 978 (1972), "the values commonly associated with free expression . . . that we esteem in a free society do not turn to dross in an unfree one." And virtually all other courts have held similarly. See, *e.g., Nolan v. Fitzpatrick*, 457 F.2d 451 (1st Cir. 1971); *Sobell v. Reed*, 327 F. Supp. 1294, 1303-04 (S.D.N.Y. 1971). As the court below recognized, the existence of tensions in prison does not change the applicable standard—it is only that in some circumstances that standard is easier to meet. Compare *Banks v. Havener*, 234 F. Supp. 27 (E.D. Va. 1964). Indeed, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), two Justices thought there would be some adverse effect on national security from the publication, but they nevertheless voted to strike down the prior restraint. See 403 U.S. at 730, 731 (Stewart and White, JJ., concurring). See also *United States v. Robel*, 389 U.S. 258, 263-64 (1968).

The burden of justification is even heavier where what is at issue are not *prisoners'* rights, where a "punitive regimen" may be relevant, see *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971), *Nolan v. Fitzpatrick*, 451 F.2d at 550, but the *community's* right to know. See *Washington Post Co. v. Kleindienst*, slip op. 7-8.

And finally, even if a "rational basis" standard is appropriate, such a basis has not been made out, as Judge Hamlin found below.

B. The district court properly found no rational or other valid basis for defendants' total, inflexible ban on press interviews with specific individual inmates.

It should first be re-emphasized exactly how broad and inflexible defendants' ban is. Defendant Procunier operates a penal system involving 21,000 prisoners and containing twelve camps, minimum security institutions, and work-release programs, as well as highly secured prisons. See *Juvenile and Adult Correctional Institutions and Agencies* (ACA 1973). He permits no interviews with specific individual inmates no matter how well-behaved and obscure they are, no matter where they are located, no matter what the reasons for the interview, no matter whether they are on work-release programs—in short, no matter how non-existent the security or other problem that particular interview may post.*

Surely, one would be hard put to find a *more* drastic alternative, one which draws a *broader* and less discriminating classification. Compare *Chicago Police Dept. v. Mosley, supra.*

The best evidence for the lack of need for such a blunderbuss approach comes from defendant Procunier himself, in his *Washington Post* testimony already quoted at p. 15 above. And the fact that, as Judge Gesell found, in the *Washington Post* case, so many other jurisdictions apparently get along easily with more flexible rules, see *Washington Post* Findings 52-54, makes it even clearer how unnecessary is such an all-inclusive bar.

* It will be recalled that the district court found that none of the plaintiffs herein posed any security problem. App. 31.

Defendants present three justifications, all of which the district court rejected in connection with the inmates' rights after considering the voluminous affidavits, interrogatories and live testimony.

1. *Administrative convenience.*

All courts that have dealt with this issue have found prison officials' claims unfounded. In California, particularly, where there are thousands of visitors annually to San Quentin alone, the additional burden of a few press interviews seems negligible.* See especially Findings of Fact 48-50, 52-60 in *Washington Post Co. v. Kleindienst.*

2. *Rehabiliation.*

There was no showing whatsoever how rehabilitation could be hindered by such interviews.

3. *Security.*

Security is obviously a compelling interest, and press-appellants do not minimize it. But a showing must be made of a meaningful connection between press-inmate interviews and security, and that the least drastic alternative has been chosen.

Defendants tried to develop a theory that somehow prison interviews would increase an inmate's notoriety and make discipline more difficult. No evidence was presented in support of this, and it certainly could not be a justification for an across-the-board proscription of all interviews. Almost every court that has dealt with this

* By coincidence, counsel conducted a survey of State policies on press access to prisons in 1971. The California response by Mr. Guthrie (apparently the same person as Mr. "Guthry" referred to above) indicates no administrative problems whatsoever. A copy of that response is reprinted in the Appendix to this brief.

claim has found that it does not justify an absolute and universal ban. See *e.g., Washington Post Co. v. Kleindienst,* slip op. 14-17. The one example cited by defendants —the George Jackson incident—was revealed in testimony to have had nothing to do with press interviews. See App. ——. Mr. Guthry admitted on cross examination that the link between a few press interviews and "celebrity" status was tenuous, Joint App. 253, and that in any event, it was a manageable problem by controlling the number of interviews. *Id.* at 254.

Indeed, defendant Nelson declared in Interrogatory Answer 11 that "an interview . . . is a security threat only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates." Joint Appendix 55.* And, it must be recalled, the district court found that *these* plaintiffs represented no security threat at all.

Surely if real questions as to the national security do not automatically eliminate First Amendment protections, *New York Times Co. v. United States,* 403 U. S. at 730, 731; *United States v. Robel,* 389 U. S. 258, 263-64 (1968), invocation of prison security must be even more solidly supported.

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* There is one particularly revealing indication of how flimsy this argument is. At one point, defendants' counsel cited an interview with Charles Manson as one which would not be permitted on a specific basis. Joint App. 238. But when interviews were allowed with a group of prisoners on death row, Manson was in fact interviewed. Joint App. 243. How much dangerous "big wheel" publicity was avoided by allowing the Manson interview to take place on a "random basis" but not on an individual one? In short, defendants' position is not only internally consistent, compare *Globe Newspaper Co. v. Bork, supra,* (memo op. 11), but makes little sense in terms of defendants' own reasons for it.

In sum, defendants' arguments rest solely on unsupported surmise and conjecture. But if "the First Amendment tolerates absolutely no prior judicial restraint of the press predicated upon surmise or conjecture that untoward consequents may result," *New York Times v. United States*, 403 U. S. at 725-26 (Brennan, J., concurring) it especially tolerates no such poorly grounded and overbroad restraint by prison administrators who "are not charged by law with the responsibility for interpreting and applying constitutional provisions, and . . . [who] are not always disinterested persons in the resolution of prison problems." *Brown v. Peyton*, 437 F.2d at 1232. See also *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir., 1972); *Nolan v. Fitzpatrick*, 451 F.2d at 549; *Fortune Society v. McGinnis*, 319 F. Supp. 904 (S.D.N.Y. 1970); *Davis v. Lindsay*, 321 F. Supp. 1134, 1138 (S.D.N.Y. 1970); *Sobell v. Reed, supra.*

Conclusion

In 1787, Thomas Jefferson wrote to Edward Carrington that the way to prevent errors by a free people "is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers shall penetrate the whole mass of the people."* That is still our faith.

Defendants' policy violates that fundamental belief. To affirm the district court's ruling, especially in light of the district court's rejection of defendant's justification, is not merely to deny the press a preferred position, but to discriminate against it. Neither a free society nor any hopes for prison reform can survive such a ruling.

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* XII Papers of Thomas Jefferson (Boyd ed.) 48-49.

This Court should rule that press access to specific individual inmates is to be permitted unless it is shown that the particular interview presents a clear and present danger to a valid penological interest. The district court's decision in favor of defendants should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOOKER T. HILLERY, JR., *et al.*,
Plaintiffs,

vs.

RAYMOND K. PROCUNIER, *et al.*,
Defendants.

No. C-71-2150 SW

Memorandum of Opinion

(Filed August 16, 1973.)

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS District Judges:

WILLIAMS, District Judge:

At issue here is the constitutionality of § 415.071 of the California Department of Corrections Manual, which provides:

> "Press and other media interviews with specific individual inmates will not be permitted."

I.

Plaintiffs seek injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is conferred upon this court under Title 28 U.S.C. §§ 1343(3), 1343(4) and 2201.

II.

Plaintiffs Hillery, Spain, Bly and Guile are prisoners at San Quentin State Penitentiary. Editors of ***Earth Magazine*** wish to interview Hillery. Plaintiffs Pell, Sebal, and Jacobs are, respectively, free lance, newspaper, and television journalists each of whom wishes to interview one of the three other inmate plaintiffs. Each of the inmate plaintiffs has affirmatively consented to an interview; each request was denied by the Warden on the basis of § 415.071. None of the prisoner plaintiffs has been alleged by the defendants to have presented disciplinary problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks.

Defendant Procunier is the Director of the State Department of Corrections. Defendant Nelson is the Warden of San Quentin; defendants Park and O'Brien are Associate Wardens.

III.

This case has its humble origins in a complaint drafted by a lay prisoner serving time at San Quentin. Shortly after the action was filed the court appointed counsel and the complaint was amended in March 1972 to add several other prisoners and media representatives as plaintiffs. The State filed a motion to dismiss for failure to state a claim upon which relief can be granted. The matter was thoroughly briefed and the court, on September 29, 1972, preliminarily enjoined the enforcement of § 415.071 and ordered defendants to submit proposed revisions to the regulations comporting to the standards set forth in the court's memorandum of decision. The State immediately moved for vacation of the order for lack of jurisdiction,

arguing, for the first time since the initiation of the lawsuit, that since the regulation in question was applied by the Department of Corrections uniformly throughout the entire state penal system, the matter must be adjudicated by a three-judge court. Title 28 U.S.C. § 2281; *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969).[1]

Plaintiffs conceded that given the scope of application of § 415.071 the injunction was invalid. They urged the court to grant a temporary restraining order pending a final disposition by the three-judge panel. Upon affidavits submitted on behalf of the plaintiffs the court found that plaintiffs would suffer irreparable harm if the relief were not granted and issued the temporary restraining order under the same terms as provided in the original injunction. Title 28 U.S.C. § 2284(3).

Interim regulations were formulated by the prison officials and implemented in November 1972. None of the sought-after interviews took place, however, and plaintiffs subsequently moved the court to hold defendants in contempt for failure to comply with the order. Defendants moved the order be dissolved. Both motions were denied in light of the impending hearing by this court.

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[1] The litigation had proceeded for almost a year with the parties' and the court's attention focused on the interview practice at San Quentin, where all of the inmate plaintiffs are detained, the interviews sought by the media plaintiffs were to take place, and all the defendants, save Mr. Procunier, were employed. The State in its moving papers, explained that it did not feel obliged to bring to the attention of the court the statewide nature of the regulation or the jurisdictional point beforehand because it was of the opinion that the issue presented in the lawsuit was insubstantial—a somewhat curious appraisal given the court's obvious concern over the constitutional questions presented by the complaint, manifested, in part, by appointment of counsel for plaintiffs.

Appendix A—Memorandum of Opinion

The panel convened February 22 to determine the constitutionality of § 415.071 as originally worded. The instant ruling is based on the arguments and testimony offered on that date and the memoranda of law and affidavits submitted by the parties.

IV.

Prior to the implementation of § 415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960s such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon of the "prison celebrity" or "big wheel"—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the "celebrity" over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison.

It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem.

The regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population.[2] Thus, media representatives are able to interview an inmate, but unable to select a particular inmate. Similarly, a prisoner who happens to be randomly selected can express himself personally to the newsman or journalist, but cannot initiate an interview himself.[3]

V.

The media plaintiffs herein and amicus curiae[4] argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees. It has been made clear in recent decisions by the Supreme Court that the press enjoys no greater right to access to news sources than the average citizen. In *Branzburg v. Hayes*, 408 U.S. 665 (1971) the Court held that newsmen were not immune to grand jury solicitation of or information derived from the newsman's confidential sources. While the facts of that case are substantially different than those presented here, the Court unequivocally dismissed any notion that the First Amendment bestowed upon newsmen special news-gathering privileges. Reviewing past decisions on the subject[5] the Court observed:

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[2] It is not clear whether selection is made from all segments of the population or whether it is limited to those sections where visitors otherwise have access.

[3] Prisoners engaged in writing for publications are authorized to meet with their publishers' representatives under a separate regulation covering *business* activities of prisoners.

[4] American Civil Liberties Union.

[5] *Inter alia, Zemel v. Rusk*, 381 U.S. 1 (1965); *Shephard v. Maxwell*, 384 U.S. 333 (1966).

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684.

As in *Branzburg*, the present case ". . . involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." 408 U.S. at 681.

This rationale was followed by the Ninth Circuit in the recent decision in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, Civ. No. 72-2330 (June 7, 1973). In that case media plaintiffs and prisoner intervenors challeged a regulation implemented at McNeil Island Federal Penitentiary which prohibited press interviews with willing prisoners. With respect to the First Amendment claims of the media representatives, the court held that under *Zemel v. Rusk, supra*, the "'. . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information'" (Slip opinion at 7), and that the "disruptive influences" at McNeil "outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews." Slip opinion at 7.

The *Seattle-Tacoma* ruling with respect to the media claims controls here. We note in passing however, that cases cited by plaintiffs emanating from other jurisdictions apparently arriving at an opposite conclusion are distinguishable. In *Washington Post v. Kleindienst*, Civ. 467-72 (D.D.C. April 9, 1972), 40 U.S.L.W. 2683[6] for example, the

[6] In its first Washington Post rulings (hereinafter "Washington Post I") the district court enjoined defendants' enforcement of a regulation banning personal interviews between press representatives and

(Footnote continued on following page)

regulation held unconstitutional barred *all* interviews with inmates at federal penitentiaries in Connecticut and Pennsylvania. The court held that "[a] continuing flat ban against press interviews of any prisoner, at any time, in any institution, is on its face arbitrary." *Washington Post I* at p. 5. In that context, it is apparent the press was not being granted a *special* right of access to prisoners, but simply *some* access. Even under § 415.071 as it stood before today's ruling the press was given the freedom to enter the California institutions and interview at random, and it is the conclusion of this court that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates.

VI.

We turn next to the prisoners' rights as they are affected by § 415.071. Case law dealing with the constitutionality of prison regulations has proliferated in recent years. From those decisions the court discerns three axioms within

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(Footnote continued from preceding page)
inmates. Defendants secured a stay of that ruling by the Supreme Court *Kleindienst v. Washington Post Co.*, 406 U.S. 912 (1972) and appealed the decision to the court of appeals. That court remanded the case to the district court for reconsideration in light of *Branzburg v. Hayes, supra,* and for further evidentiary proceedings to examine, among other issues, the necessity of personal interviews and the legitimacy of the "big wheel" theory. *Washington Post v. Kleindienst,* Civ. No. 72-1362 (D.C. Cir., September 6, 1972). The district court held further hearings and issued a Supplemental Memorandum, confirming its earlier rulings and specifically finding that personal interviews are essential to the exercise of both the prisoners' and medias' First Amendment rights, that the "big wheel" theory was unsubstantiated and that *Branzburg* was inapplicable. *Washington Post Co. v. Kleindienst,* Civ. 467-72 (D.D.C. December 19, 1972) (hereinafter "Washington Post II").

whose bounds the current analysis must take place. 1) It is clear that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266 (1948)[7] 2) Further, prison officials are properly given a great degree of discretion in the administration of appeal institutions. *Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951); *Seale v. Manson*, 326 F.Supp. 1375 (D. Conn. 1971) and cases cited at 1379. 3) But it is equally clear that a prisoner does not lose all constitutional rights with the slamming of the jailhouse door (*Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd.* 400 F.2d 1092, *supra; Seale v. Manson, supra*, at 1379), particularly where the prisoner's First Amendment rights are imperiled. *Nolan v. Fitzpatrick*, 326 F.Supp. 209 (D. Mass. 1971), *reversed on other grounds*, 451 F.2d 545 (1st Cir. 1971), *Burnham v. Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972), *Washington Post Co. v. Kleindienst I, supra.*

That § 415.071 abridges, to some degree, plaintiffs' freedom of expression is certain. But even in the "outside world" certain limitations on speech are constitutionally permissible. See, *Kovacs v. Cooper*, 336 U.S. 77 (1949). In determining whether this section is unconstitutional the court must first discern and then balance the prisoners' interests against those of the State.

Defendants argue that plaintiffs' First Amendment rights are sufficiently protected by the press regulation as it stands, in that *written* communications to the press remain

[7] Holding, *inter alia*, a prisoner is not entitled to personally appear at the hearing of his habeas corpus petition.

unobstructed and personal interviews are permitted, albeit on the random basis described above. But the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say, may, with bad luck, never be able to say it effectively. The court is of the opinion that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. Other courts have come to the same conclusion. In *Burnham v. Oswald, supra*, the court dealt with facts almost identical to those presented here. There, inmates at Attica State Prison and newsmen challenged prison regulations that were adopted shortly after the riot of September 9-13, 1971. The regulations permitted press interviews of inmates at the discretion of the Superintendent, who was authorized to deny a request if he determined it would adversely affect the "integrity" of the institution. "Integrity" was left undefined by the regulations. The court held that the regulations granted the Superintendent too broad a discretion in his determination of whether an interview could be held.

> "The court holds that an interview with a consenting inmate must be permitted unless it is determined that to hold the interview would present a clear and present danger of breach of the security, discipline or orderly administration of the institution, [citations omitted], or that the inmate had clearly abused his right of access to the press." 342 F.Supp. at 887.

A significant factor in the court's ruling was the finding that:

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Fur-

> ther, there are many prison situations which can only be explored fully and accurately by a face-to-face interview." 342 F.Supp. at 885.[8]

A similar holding was enunciated in *Washington Post Co. v. Kleindienst* where the court was persuaded by the plaintiffs' argument that "[c]ommunication by correspondence is . . . too impersonal and timeconsuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write. Prison tours and related conversations with individuals or groups are . . . to hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation." *Washington Post I*, at p. 5; *Washington Post II*, at p. 1. See, also, Comment, A Prisoner-Press Interview Right, 11 Am.Crim. L.R. 273 (1972). The court fails to see how either of the two virtues of personal interviews—assiting inarticulate inmates express themselves clearly and verifying their stories—can in themselves be objected to by the authorities.

Which brings us to an evaluation of the prison's interest in the preservation of § 415.071. It is a fundamental precept of constitutional law that when a state restricts a First Amendment right, especially when that restriction is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation. *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Edwards v. South Carolina*, 372 U.S. 229 (1962). This standard applies in the prison context (*Nolan v. Fitzpatrick*, *supra*,

[8] But see *Smith v. Bounds*, Civ. No. 2914 (E.D.N.C. March 10, 1972) where it was held that written communication to the press sufficiently preserved the inmates' rights.

Burnham v. Oswald, supra, at 885, *Fortune Society v. McGinnis,* 319 F.Supp. 904 (S.D.N.Y. 1970), *Seale v. Manson, supra, Cf. Martinez v. Procunier,* C-71-543 (N.D. Cal., Feb. 2, 1973) (three-judge court), at pp. 7-8), despite language used by other courts, in dealing with similar cases, that at first glance appears to indicate a lesser standard should be employed. Defendants cite *Carothers v. Follette,* 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both "reasonably . . . and necessarily . . . to the advancement of some justifiable purpose of imprisonment." 314 F.Supp. at 1024. The court believes that this rule is not only consistent with the "compelling interest" test, it is its concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related—"reasonably and necessarily" —to the end sought.

To the extent that *Carothers* can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who have abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of "clear and present danger" in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably "compelling state interests" (See *Carothers, supra,* at 1024), regulations advancing those interests must be

tailored so as not to unnecessarily restrict First Amendment rights.

Turning to the instant regulation, the state has offered four grounds upon which it attempts to defend § 415.071. None are sufficiently substantiated by fact to sustain the defense.

A.

Administrative Burden

The state anticipates that too wide an access by the press to inmates will result in an intolerable demand on facilities and man-hours. Defendants point to one history in which a prisoner was interviewed sixty-six times in a six-month period. On closer examination, however, this "example" was not only revealed to be a clear exception to the then prevailing practice but appears to have been totally media-initiated. In fact, the number of requests *by prisoners* for press interviews was minimal, as indicated in Warden Nelson's Answers to Interrogatories (filed April 10, 1972):

> "4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media?"
>
> • • •
>
> "A: We have no record of this information. *Requests by prisoners for interviews with media are rare, and none are recalled.*" (Emphasis added).

Additionally, the prison maintained no records as to the number of interviews initiated by media personnel although, presumably, such requests were somewhat more frequent. And insofar as the prisoner's right to interview

is concerned, the Warden's response to Interrogatory #4 dispels any notion that prisoner-requested interviews have presented an extraordinary administrative burden. In short, the present regulation attempts to obviate an administrative problem that does not exist, and is therefore neither reasonably nor necessarily related to a legitimate state interest.

By holding that the State has made an insufficient factual showing of administrative burden, the court does not imply that reasonable limitations as to the time, place, and manner of such interviews cannot be imposed. On the contrary, it is obvious that regulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible. See *Seale v. Manson, supra*, at 1383.

B.

Security

Much of the State's argument with respect to the security factor of § 415.071 hangs on the "big wheel" theory discussed in Subparagraph D *infra*. The court takes the defendants to argue, additionally, that the mere presence of large number of newsmen endangers the security of the prisons. It might first be noted that newsmen ". . . are not inherently security risks." *Nolan v. Fitzpatrick, supra*, at 213. And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at

the hearing that "hundreds" of private citizens visit California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past;[9] and they have conspicuously failed even to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

Prison security is patently a legitimate concern of the defendants, but § 415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it. As mentioned above, the number of interviews may be reasonably limited so as to assure adequate supervision by correctional officers. Likewise, the prisons officials may require interviews to submit to reasonable searches for contraband, escape plans, or weapons as a precondition to the interview. Finally, if the authorities have good cause to believe that a *particular* interview would pose a clear and present danger to prison security, it may be denied.

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[9] The events of August 21, described above, were allegedly sparked by an inmate being given a weapon by an *attorney*.

C.

Rehabilitation

The State offered little more than vague speculation as to how § 415.071 advances the rehabilitative programs in California prisons and has thus failed to carry its burden of justifying the section on this ground.

D.

The "Big Wheel" Theory

Defendants' principal argument in defense of § 415.071 rests on the "Big Wheel" or "celebrity" theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates. This understandably would have several undesirable effects. The elevation of individual prisoners to "celebrity" status is detrimental to the Department's disciplinary efforts, which are founded on the policy of treating all prisoners equally, giving no single prisoner specific privileges with which he might use to obtain an advantage over others. When an individual prisoner achieves a sense of special status he is able, defendants contend, to induce other inmates to combine and engage in behavior they otherwise would not exhibit. When two or more rival "big wheels" rise to power, a situation not unlike street gang warfare can result, leading to large scale intimidation, coercion and violence.

The spectre of such a state of affairs is indeed alarming. And this court entertains no doubt that violence exists in correctional institutions in California or that the Department's task of reducing violence is an exceedingly difficult one. The question here, however, is whether § 415.071

is reasonably and necessarily related to that task, and the court must conclude that the "big wheel" theory, in the end, has been shown by defendants, *in this particular case,* to be little more than that—a theory. The events out of which § 415.071 emanated and by which the Department has attempted to justify the rule—the August 21 incident—serve to illustrate the inapplicability of the theory in this case. One of the prisoners who was killed that day had been interviewed sixty-six times in a six-month period and had published a book composed of letters he had written to members of his family and his attorney which, in substantial part, were critical of society in general and prison administration in particular. Mr. Guthrie described the prisoner as a "big wheel" and stated he believed the August 21 violence arose, in part, out of the theretofore liberal interview policy. However, when questioned further he admitted that the prisoner has in fact only a limited reputation outside prison and had not achieved "celebrity" status within it prior to August 21. Such status was attained only *after* his death. Mr. Guthrie also testified that between 1970 and the date of the hearing ten professional employees and twenty inmates were murdered in California correctional institutions and that in his opinion this violence can be attributed to the liberal interview policy and the influence of the "big wheels." But when asked to explain the nature of the connection between interviews and the violence neither Mr. Guthrie in his testimony, nor defense counsel in his argument, nor Mr. Procunier in his affidavit, could specify facts showing a direct relationship between the two.

Seattle-Tacoma Newspaper Guild, Local #82 v. Parker, supra, is distinguishable with respect to this issue on two

grounds. First, the evidence in Seattle-Tacoma persuasively illustrated that the prison officials had made a "considerable study" of the interview practice and had "concluded that the ban on interviews is necessary to maintain the discipline, custody, and control of the prison." (Slip opinion at 5). As related above, no such showing was made in the present case; on the contrary, defendants' testimony compels a finding that no correlation between press interviews and prison disturbance exists. Secondly, the *Seattle-Tacoma* case dealt with a regulation applicable only to McNeil Island Penitentiary, a maximum security institution designated for detention of selected prisoners who present serious disciplinary and security problems. (Slip opinion at 4). The regulations had been promulgated on the heels of a riot. Here, the challenged regulations are applied at *all* California state penal institutions, from maximum security prisons to work farms, without regard to the various safety and disciplinary characteristics within the system. On this ground alone the regulation is unconstitutionally overbroad.

Seale v. Manson, supra, cited by defendants in support of the theory is also inapposite. There the plaintiff was being held at a Connecticut state prison without bail on serious criminal charges. He challenged a regulation that expressly *permitted* press interviews with specific inmates, but required prior approval by the Warden. On two occasions reporters were denied access to Seale. The court held, and we agree, that the defendants had a legitimate concern in preventing a prisoner from becoming a "wheel" in the institution and that *limiting* (not, as here, totally excluding) interviews with specific inmates was a permissible means by which to achieve that goal. The court notes

that in *Seale* it appears that plaintiff did not disclaim his reputation as a "wheel." In the present case it is not alleged that any of the named plaintiffs have shown a desire to become a celebrity. Mr. Guthrie stated that at the present time he is unable to name a single celebrity throughout the entire California correctional system. The unavoidable conclusion is that no matter how plausible the "big wheel" theory, there is no hard evidence that the danger presented by interviews is either clear or present. The regulations flatly prohibiting such interviews are therefore unconstitutional.

VII.

For the reasons above, it is Adjudged, Ordered and Decreed that:

1. Defendants' motion for dismissal as against the media plaintiffs is Granted.

2. The inmate plaintiffs' motion for summary judgment is Granted.

3. Defendants shall within 30 days present to the court proposed regulations comporting to this decision.

4. Defendants shall permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision.

Dated: August 16, 1973.

....., *United States Circuit Judge.*

....., *United States District Judge.*

/s/ SPENCER WILLIAMS, *United States District Judge.*

Appendix A—Memorandum of Opinion

Before: HAMLIN, *Circuit Judge*, EAST and WILLIAMS, *District Judges*.

HAMLIN, *Circuit Judge*, concurring:

For the reasons expressed in the majority opinion I concur in the holding therein that section 415.071 is not violative of the rights of the news media.

I concur also in the holding in that opinion that said section is violative of the rights of the plaintiff inmates, but I do so on a different basis.

The majority examines the constitutionality of the regulation prohibiting inmates from requesting interviews with the news media under the "compelling interest" test, applicable to First Amendment restrictions in society at large.

However, in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, ____ F.2d ____ (9 Cir. June 7, 1973), the Ninth Circuit Court of Appeals eschewed the "compelling interest" test as applied to First Amendment restrictions in the prison context, and substituted therefore the "rational basis" analysis:

> "* * * the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any *rational* and constitutionally acceptable concept of a prison system.' (citation omitted). We find that the interview ban is *reasonable action* within the scope of the wide discretion of the prison administrators, and that it does not violate the prisoners' First Amendment rights." (citation omitted.)

APPENDIX B

Letter Dated March 2, 1971

State of California—Human Relations Agency
DEPARTMENT OF CORRECTIONS (SEAL)
Sacramento Ronald Reagan, Governor

March 2, 1971

Mr. Herman Schwartz
Professor of Law
Faculty of Law and Jurisprudence
State University of New York
Buffalo, New York

Dear Mr. Schwartz:

This is in response to your February 26 letter concerning interviews with inmates by representatives of the news media.

It is our general policy that newsmen may interview inmates who are willing to sign a consent form. We do reserve the right to deny interview privileges in specific cases.

In the past ten years there have probably been only two or three cases in which interview requests have been denied. In the case of notorious inmates, we may impose restrictions or limitations to control the workload. For example, interviews may be confined to one a day for a period not to exceed one hour.

I hope this information is helpful to you.

Very truly yours,

PHILIP D. GUTHRIE
PHILIP D. GUTHRIE
Chief Community Relations and Information

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WASHINGTON POST CO., *et al.*,

Plaintiffs,

vs.

RICHARD KLEINDIENST, *et al.*,

Defendants.

Civil Action No. 467-72.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law

The Court, after full hearing, makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

* * *

II. The Need for Private, Confidential Interviews

20. The Court finds that the news media and newsmen have a legitimate interest in informing themselves and keeping the public informed about conditions in the institutions and facilities operated by the Federal Bureau of Prisons. Tr. 1, p. 199 (Carlson testimony). Those institutions are generally closed to members of the public, although some persons—such as families and friends of inmates, clergymen, attorneys and Congressmen—are permitted to visit them on a regular basis. Nevertheless, de-

spite the limited access to those institutions, they remain public institutions and their operations are a matter of public concern. Tr. II, p. 127 (Leland testimony); PX 14, p. 21 (Abel deposition); PX 63, p. 24 (Machacek deposition). The fact that federal prison facilities are not generally open to all members of the public only underscores the importance of the role that the news media can play in providing information about the conduct of those institutions. PX 65, pp. 57-60 (Mattick deposition).

21. The Court finds further that the plaintiffs had a legitimate news interest in seeking to develop additional information about the events that occurred at the federal prisons at Lewisburg and Danbury during and following the work stoppages at those two institutions. Specifically, the plaintiffs wished to examine how the work stoppages were resolved without bloodshed, the role played by inmate negotiating committees elected by the inmates in reaching a peaceful settlement of the disputes, and whether the inmate leaders had been punished despite promises of no reprisals. Tr. I, pp. 20, 57 (Bagdikian testimony).

22. The Court finds that the defendants have not imposed a news blackout on events and conditions at federal prisons, as the plaintiffs have alleged in their papers. See, *e.g.*, Complaint, ¶11. The sources of information about federal prisons, which are recited in paragraphs 12-17, *supra*, and which are available to the news media under Policy Statement 1220.1A enable newsmen to obtain some information about events and conditions at federal prisons.

23. The Court also finds, however, that the flat prohibition in Policy Statement 1220.1A of private, individual

interviews between newsmen and inmates willing to be interviewed prevents the news media from developing accurate and effective accounts of conditions and events in federal prisons or grievances of inmates confined to those prisons. Tr. II, pp. 14-44 (Fisher testimony); *id.*, at 122-23 (Leland testimony); PX 14, pp. 13-18 (Abel deposition); PX 63, pp. 18-21 (Machacek deposition).

24. The Court heard uncontradicted testimony from experienced newsmen and journalism educators that the sources of information available under Policy Statement 1220.1A—either separately or in combination—are inadequate to permit the news media to develop accurate and in-depth knowledge of prison conditions or events or prisoner grievances, as the plaintiffs attempted to do in this case.[3]

a. The essential defect in limiting contact between newsmen and particular inmates with grievances or complaints to an exchange of correspondence, as the Policy Statement does, is that the newsman has no opportunity to confront those inmates and evaluate the credibility of the information they wish to convey. Tr. II, p. 43 (Fisher testimony); *id.* at 131 (Leland testimony); PX 14, pp. 23, 32 (Abel deposition). The need for face-to-face confrontation can be of particular importance in the prison context because the inmate who complains by letter may be unknown to the

[3] Except for plaintiff Bagdikian, the newsmen and educators who testified had not had extensive experience in covering or reporting on prison conditions. But there is no basis for assuming that the newsgathering techniques or needs of newsmen covering prisons will differ significantly from those of newsmen in other assignments. PX 14, pp. 16-17 (Abel deposition); PX 63, pp. 20-21 (Machacek deposition).

news media and there would be no independent basis for evaluating his credibility and reliability. Tr. II, p. 131 (Leland testimony).

b. Newsman-inmate communication by correspondence has other serious defects. It can cause delays in developing current information about events or prison conditions. Tr. I, p. 22 (Bagdikian testimony); PX 63, p. 21 (Machacek deposition). Moreover, an exchange of correspondence does not permit a newsman to pursue a line of questioning in depth or to ask follow-up questions on the basis of a particular response. Tr. II, p. 43 (Fisher testimony); *id.* at 130 (Leland testimony); PX 63, pp. 21-22; see Tr. II, p. 14 (Liman testimony). There is also a well-founded suspicion on the part of newsmen that many inmates are not sufficiently literate to communicate effectively by means of the written word. Tr. II, p. 130 (Leland testimony) PX 14, pp. 17-18 (Abel deposition). To the extent that newsmen cannot obtain the views of inmates who are not fully literate, an important source of information is likely to be lost. PX 65, p. 61 (Mattick deposition). The loss would not be mitigated by the opportunity for some inmates to write letters on behalf of others. *Id.*[4]

c. The opportunity offered newsmen to tour federal prisons and to engage in casual conversations with inmates encountered during the tour is not an adequate substitute for private, individual, in-depth interviews. Those con-

[4] The Court also heard testimony that, because mail coming into a federal prison from a newsman is read for illegal content, inmates are likely to be reluctant to be wholly candid in their written exchanges with newsmen for fear of reprisals from prison officials. Tr. I, pp. 16-17, 22-23 (Bagdikian testimony).

versations are limited in terms of their duration, Tr. I, p. 141 (Alldredge testimony); *id.* at 175 (Norton testimony); *id.* at 189-190 (Carlson testimony), and content, Tr. I, p. 47 (Bagdikian testimony); *but cf. id.* at 154, 166 (Alldredge testimony); newsman cannot identify in their stories the inmates with whom they had conversations, Policy Statement, ¶4 (b) (6); Tr. I, p. 24 (Bagdikian testimony); and the conversations may be overheard by prison officials, Tr. I, pp. 53, 54-55 (Bagdikian testimony); *but cf. id.* at 154 (Alldredge testimony). In addition, because the newsman cannot designate in advance the inmates with whom he will converse, the opportunity for casual conversations gives him no access to inmates who are known to have particularized complaints or other particularized information. Tr. II, p. 137 (Leland testimony); PX 63, p. 32 (Machacek deposition).

d. The willingness of federal prison officials to provide the news media with information about events and conditions at those institutions is no substitute for private, individual interviews with inmates. Particularly when a newsman is seeking information relating to inmate complaints about the actions of prison officials or employees, newsmen who testified stated that their experiences make them skeptical that those officials or employees will provide them with objective and balanced information. Tr. II, p. 44 (Fisher testimony); *id.* at 128-129 (Leland testimony); PX 14, pp. 18-19, 30-31 (Abel deposition). That this skepticism is warranted is shown, for example, by the fact that public officials deliberately gave false information to the news media concerning how the hostages died during the Attica prison revolt in September 1971. PX 14, pp. 30-31 (Abel deposi-

tion); PX 63, pp. 5-14, 22-23 (Machacek deposition); PX 9, pp. 455-62 (Attica Report).

e. Plaintiff Bagdikian was given an opportunity at the federal prisons at Lewisburg and Danbury to interview several inmates selected at random from the prison population in a group and out of the hearing of prison officials or employees. Tr. I, pp. 15-18 (Bagdikian testimony). The group interview conducted by Mr. Bagdikian at Lewisburg proved "very unproductive," Tr. I. p. 50 (Bagdikian testimony), because the particular inmates he traveled to Lewisburg to interview were not part of the group and because the inmates who participated admitted they could not speak with candor out of fear that what they said would be reported to prison officials by other inmates and result in reprisals. Tr. I, pp. 17-18 (Bagdikian testimony. The evidence before the Court also shows that group interviews in the prison context are unsatisfactory because, when interviewed in groups, inmates tend to make speeches for the benefit of other inmates rather than relate facts. Indeed, the New York State Special Commission on Attica found that inmates interviewed in a group were far more critical of prison authorities than when they were interviewed in private. Tr. II, pp. 10-11 (Liman testimony).

25. Based on the evidence recited in paragraph 24, *supra*, the Court finds that the sources of information available to the news media under the Policy Statement are inadequate for the development of accurate and effective news account of prison conditions and events and prisoner grievances.

Appendix C—Plaintiffs' Proposed Findings of Fact and Conclusions of Law

26. The Court heard considerable, uncontradicted testimony from experienced newsmen, journalism educators and others concerning the importance of face-to-face private interviews as a news-gathering technique. That evidence showed the following:

a. The opportunity for face-to-face interviews with news sources is critical when the credibility and reliability of the source is unknown to the newsman. Tr. II, p. 32 (Fisher testimony); *id*, at 115-17 (Leland testimony).

b. A private interview with an inmate having a particularized grievance permits the newsman to "study the demeanor of the man, pursue questions at once, watch reactions, [and] confront him with things that seem to be internally inconsistent." Tr. I, p. 23 (Bagdikian testimony). None of those opportunities exists as a practical matter in the alternative sources of information available to newsmen under the current Policy Statement. See ¶24, *supra*.

c. In the prison context, newsmen need to interview, for purposes of corroboration, not only inmates known to have particularized grievances but also other inmates likely to have knowledge concerning the grievances. PX 63, p. 21 (Machacek deposition).

d. The opportunity for a face-to-face interview is as important to a newsman gathering news as it is to an attorney developing his case, Tr. II, p. 14 (Liman testimony), or a Police detective investigating a crime. Tr. II, P. 130 (Leland testimony).

e. Face-to-face interviews with news sources play such a fundamental role in the news-gathering process that the development of interviewing techniques is a central feature

of the curricula of the nation's most prestigious journalism schools. Tr. II, pp. 30-32 (Fisher testimony); PX 14, pp. 8-10 (Abel deposition).

f. The Court was cited a number of examples in which face-to-face interviews played the critical role in newsmen's decisions to pursue a news story or not to publish the story. Tr. II, pp. 33-35 (Fisher testimony); *id.* at 116-20 (Leland testimony); PX 14, pp. 11-13 (Abel deposition); PX 63, 15-18 (Machacek deposition).

g. In one instance cited to the Court, the *Boston Globe's* coverage of a jail disturbance was based solely on the statements of jail officials and attorneys for the inmates because its newsmen were not allowed to interview the inmates. The result was "rather grim black headlines" about mistreatment of inmates that the editor who supervised the story did not believe constituted responsible journalism. Tr. II, pp. 120-22, 139 (Leland testimony). But the newspaper had no choice but to report the story on the basis of the inadequate information available to it. *Id.* at p. 122.

h. The plaintiffs placed in evidence a study published by Journalism Quarterly which analyzed the reasons for inaccuracies in news stories. PX 10. A major conclusion of that study is that "lack of contact between the newsman and a news source increases the chance that serious subjective errors will be perceived as occurring or will occur." *Id.* at 756.

i. The report of the New York State Special Commission on Attica, PX 9, was based principally on some 3,000 interviews, 1,600 of them with inmates at that penal institu-

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tion. Tr. II, p. 7 (Liman testimony). It was the most comprehensive program of face-to-face interviews ever undertaken by persons other than prison authorities at a prison. *Id.* The General Counsel to the Commission recited to the Court an extensive catalog of significant information obtained through interviews with inmates that could not have been obtained in any other manner. *Id.* at 11-14. The Commission's experience was that confidential interviews with individual inmates were indispensable for the gathering of reliable information about conditions in prison, prisoner grievances and events in which inmates participate.

j. A sociologist with extensive experience in prison administration testified that he could obtain an understanding of a penal institution only if he had the opportunity to conduct face-to-face interviews with inmates and prison officials. PX 65, p. 48 (Mattick deposition).

27. Based on the evidence recited in paragraph 26, *supra*, the courts finds that the accurate and effective reporting of news about prison conditions and events and prisoner grievance has a critical dependence upon the opportunity for face-to-face interviews with inmates.

28. The Court further finds that interviews with inmates, to be effective and productive, must occur in privacy, with only the newsman and inmate present. The presence of prison officials or prison employees can have an inhibiting effect on the interview process because "a prison official has total control over the life of a prisoner and [the prisoner] knows it." Tr. I, p. 24 (Bagdikian testimony). Even the presence of other inmates is likely to prevent a candid exchange with the newsman because the inmate being in-

terviewed must be concerned with how the other inmates will react to the information he conveys. Tr. I, pp. 17-18 (Bagikian testimony); Tr. II, pp. 10-11 (Liman testimony).

* * *

B. *Other Security Problems*

47. The Court finds that press interviews with inmates are not likely to create any additional prison security problems. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-49 (Bensinger deposition).

a. Security procedures used by prison administrators to prevent the introduction of contraband by friends, relatives, attorneys, and other visitors to prisoners are readily applicable to newsmen entering prisons to interview inmates, without any loss of effectiveness. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-48 (Bensinger deposition).

b. Members of the press are no more likely to introduce contraband than are lawyers, friends, relatives, or other visitors. PX 64, p. 48 (Bensinger deposition).

c. Members of the press are no more likely to participate in escape plans, to solicit offenses, or to make other unlawful or improper communications with inmates than are lawyers, friends, relatives, or other visitors. PX 64, p. 49 (Bensinger deposition).

C. *Administrative Burdens*

48. The Court finds that press interviews with inmates will create no undue administrative burdens in view of the fact that prison officials have the power to set reasonable

restrictions as to time and place, as they do for all visits to penal institutions. Tr. II, p. 88 (Boone testimony); PX 64, p. 51 (Bensinger deposition).

a. The visiting facilities at penal institutions are frequently not used to their full capacity, and thus are available for press interviews with inmates. Tr. II, pp. 181-82 (Alldredge testimony). Other facilities—e.g. conference rooms used for attorneys visit—are also likely to be available at many institutions. PX 64, p. 24 (Bensinger deposition).

b. Those jurisdictions which generally permit press interviews with inmates have had a relatively small number of requests for such interviews. Tr. II, p. 239 (Brewer testimony); Tr. I, p. 75 (Malcolm testimony); Tr. I. p. 99 (Anderson testimony); PX 64, p. 52 (Bensinger deposition). In these same jurisdictions, there has been considerable public interest in the prison system. Tr. I, p. 75 (Malcolm testimony); Tr. II, pp. 77-78 (Boone testimony).

c. Most large penal institutions facilitate thousands of interviews per year between inmates and their friends, relatives, and counsel. Tr. II, pp. 178-79 (Alldredge testimony); Tr. I, p. 67 (Malcolm deposition); PX 64, p. 53 (Bensinger testimony). The number of press interviews likely to occur, and the resulting administrative burden, are insignificant in relation to the total number of interviews granted each year. PX 64, p. 53 (Bensinger deposition).

d. Press interviews with inmates do not create significantly greater administrative burdens than other visits from friends, relatives, and counsel. Tr. II, p. 88 (Boone

testimony); but *cf.* PX 64, pp. 49-51 (Bensinger deposition).

V. *Benefits of Press Interviews to Correctional Systems*

49. The Court finds that opportunities for inmates to speak to newsmen tend to reduce tensions within the inmate population of a prison. Tr. I, 73 (Malcolm testimony); Tr. II, p. 83 (Boone testimony).

50. The Court finds that a policy of freely permitting interviews between members of the press and inmates is likely to increase press and public interest in corrections, and may lead to public pressure for improvements in correctional facilities, programs, and administration. Tr. II, pp. 78-79, 80, 84-86 (Boone testimony); PX 65, pp. 45, 26 (Mattick deposition); Tr. I, pp. 72, 73 (Malcolm testimony).

* * *

VI. *Policies in American Jurisdictions*

52. Evidence was received showing the current policy with respect to confidential in-depth interviews between members of the press and inmates of correctional institutions in 24 American jurisdictions. The Court finds that of these, 11 generally permit such interviews. See Ex. 1 to PX 64 (Bensinger deposition) (Illinois); PX 22-A (Maine); PX 23-A (Maryland); PX 25-A (Nebraska); PX 28-A (North Carolina); PX 29-A (Ohio); PX 35-A, 35-C (Vermont); DX 7 (Iowa); PX 1, 2, 3 (New York City); PX 5, 6 (District of Columbia); Tr. II, 58-77 (Boone testimony) (Massachusetts). Seven American jurisdictions have policies that neither generally permit nor generally

deny such interviews, but vest in correctional administrators discretion to permit or deny them in individual cases. See PX 18-A (Alaska); PX 20-A (Georgia); PX 24-A (Montana); PX 26-A (New Jersey); PX 30-A (Oregon); PX 31-A (Pennsylvania); PX 32-A (South Carolina). Five American jurisdictions generally prohibit such interviews. See PX 19-A (Connecticut); PX 21-A (Kentucky); PX 33 (Virginia); PX 34-A (Wisconsin); Tr. I, p. 114 (California). New Mexico has a unique policy, which does not fit into any of these categories. See PX 27-A, 27-B (New Mexico).

53. The Court finds that there is no substantial reason to believe that the problems involved in administering the federal prisons are more severe than those involved in administering prisons in the 11 jurisdictions that generally permit press interviews. Tr. II, pp. 58, 110-B (Boone testimony); Tr. I, pp. 62, 88 (Malcolm testimony); Tr. I, pp. 104-07 (Colloquy between the Court and Mr. Hannon); PX 65, pp. 41-42 (Mattick deposition). Contra, Tr. II, pp. 209-10, (Wainwright testimony); PX 64, pp. 65-67 (Bensinger deposition).

a. Federal prisons have a higher percentage of white collar criminals and inmates committed for non-violent crimes than do state or local prisons. PX 65, pp. 41-42 (Mattick deposition).

b. From a correctional point of view, inmates held for trial are far more difficult to manage than are sentenced offenders. Tr. I, p. 88 (Malcolm testimony).

54. The Court finds that defendants have not shown that from a correctional point of view the Federal Bureau of

Prisons has any substantial interest in having an absolutely uniform policy with respect to press interviews with inmates applicable at all institutions and to all inmates under its jurisdiction. See Tr. II, pp. 253-61 (Carlson testimony).

a. The policy of the Federal Bureau of Prisons is not to make all its institutions uniform, to have them all uniformly administered, or to treat all inmates as if they had the same correctional needs. Quite the contrary, the policy of the Federal Bureau of Prisons is to establish and maintain various types of institutions, having different correctional policies and serving different correctional needs, so that different inmates are subjected to different institutional experiences in federal correctional institutions. Tr. II, p. 260 (Carlson testimony); DX 11 (Federal Bureau of Prisons Biennial Report, 1970-71).

b. Even among institutions where uniformity may be sought as a matter of policy, in a large number of respects it is not, and cannot be, achieved. Every prison reflects the background, personality, style and training of its chief administrator; the personal qualities of its staff; the region in which it is located; and the daily life of its inmates is affected by its particular physical plant and other resources. As these differ from one institution to another, the inmates at those institutions will inevitably experience significant differences in their rights, privileges and opportunities. In view of these differences, any differences in the administration of a policy vesting some discretion in prison administrators over the holding of press interviews are of trivial or very minor significance. PX 65, pp. 42-45 (Mattick deposition).

Appendix C—Plaintiffs' Proposed Findings of Fact and Conclusions of Law

VII. *Feasibility of a Press Interview Policy Vesting Significant Discretion in Prison Officials*

55. The Court finds that state and federal prison officials are able in most cases, and with no more than ordinary human error, to identify actual and potential big wheels and trouble-makers within their institutions.

a. Within the first few weeks of commitment to federal prison, all inmates within the jurisdiction of the Federal Bureau of Prisons receive a thorough evaluation, including intensive diagnostic studies. DX 11, p. 7 (Federal Bureau of Prisons Biennial Report 1970-71). The results of this evaluation are available to prison administrators and are the basis for many significant decisions made with respect to the handling of inmates.

b. In general, and with no more than ordinary human error, prison administrators and their staffs know who are the actual and potential trouble-makers within their institutions at any given time. See Tr. II, p. 189 (Alldredge testimony); *cf.* Tr. II, pp. 193, 196-97 (Wainwright testimony).

56. Information similar to that available to federal prison officials is the basis for the operation of Illinois' policy, which generally favors press interviews with individual inmates, but vests significant discretion in prison administrators. This policy has proved to be feasible in Illinois, and has worked satisfactorily. PX 64, pp. 28-31 (Bensinger deposition).

57. The Association of State Correctional Administrators has promulgated a guideline on relations between news

media and prisons which provides for discretion in prison administrators to grant or deny interviews on an individual basis. Ex. 2 to PX 64 (Bensinger deposition). In promulgating that guideline, the ASCA took the view that such a policy would work effectively. PX 64, p. 43 (Bensinger deposition).

58. The National Council on Crime and Delinquency has promulgated a Model Act for the Protection of Rights of Prisoners, § 7 of which provides, *inter alia*, that "[a]ny . . . citizen may make application to visit an institution and talk in private with prisoners if the applicant establishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution." Section 7 further provides:

> "If the application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution." PX 15, pp. 18-19 (NCCD Model Act).

This provision plainly contemplates that newsmen shall have opportunities to have private interviews with inmates, subject to discretion in prison administrators to prohibit

such interviews where necessary in the interest of protecting the functioning of the institution. The NCCD and the committee which drafted the model act plainly have concluded that the exercise of such discretion by prison administrators is feasible and consistent with correctional goals.

59. The fact that 19 American jurisdictions have policies which permit interviews while giving greater or lesser scope for the exercise of discretion by prison administrators, see paragraph 52, *supra*, shows that a very broad spectrum of opinion of professional correctional administrators in all parts of the United States believe that a policy granting some degree of discretion to correctional administrators with respect to the permitting or denying of interviews between newsmen and inmates is feasible and consistent with correctional goals.

60. On the basis of the evidence before it, and paragraphs 55 to 59, *supra*, the Court further finds that a policy vesting significant discretion in prison officials with respect to the holding of interviews between inmates and members of the press is feasible and consistent with correctional goals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-918

EVE PELL, BETTY SEGAL AND PAUL JACOBS,

Appellants

v.

RAYMOND K. PROCUNIER, DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF HOUSTON CHRONICLE PUBLISHING COMPANY, AMICUS CURIAE

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IN THE

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EVE PELL, BETTY SEGAL AND PAUL JACOBS,

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF HOUSTON CHRONICLE PUBLISHING COMPANY, AMICUS CURIAE

OPINION BELOW

The Opinion of the three judge District Court is reported at 364 F. Supp. 196 (1973).

INTEREST OF THE AMICUS CURIAE HOUSTON CHRONICLE PUBLISHING COMPANY

The Houston Chronicle Publishing Company ("Chronicle") operates a daily newspaper of general circulation

printed in Houston, Texas and circulated throughout the City of Houston, the Southwest and the nation. Chronicle reporters investigate news of public interest and concern for publication in the Chronicle. The principal, and in many cases, the only effective means of gathering news of satisfactory reliability and comprehensiveness is through the means of face-to-face interviews by reporters with persons who have personal knowledge of the matters in question. During late 1972 Chronicle reporters were denied access to Federal prisoners held in custody in county jails in Harris and Galveston counties, Texas. The Chronicle filed suit for declaratory and injunctive relief and on August 24, 1973 the District Court granted such relief holding the rules, regulations and procedures which prevented face-to-face interviews between Chronicle reporters and consenting prisoners to be violative of First Amendment rights of prisoners, the press and the public. *Houston Chronicle Publishing Company* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973). A copy of the Memorandum and Order entered by the District Court in the *Chronicle* suit is attached as Appendix "B" to the jurisdictional statement of Appellants on file in this case.

The Federal Defendants in the *Chronicle* case filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit but on January 2, 1974 filed a Motion to Dismiss their appeal pursuant to Rule 42(b), Federal Rules of Appellate Procedure. On January 11, 1974 the Court of Appeals for the Fifth Circuit entered its Order dismissing Federal Appellants' appeal. The State Defendants in the *Chronicle* case did not perfect their appeal to the Court of Appeals for the Fifth Circuit.

As a member of the group certain to be directly affected by any decision of this Court in the instant case and as a

prior party to litigation establishing and protecting rights sought to be protected by the Appellants in the instant case, the Chronicle has a vital interest in assisting the Court to focus upon the important issues raised in this appeal.

QUESTION PRESENTED

Whether Section 415.071 of the California Department of Corrections Manual constitutes an impermissible abridgment of the rights of the press under the First Amendment to the United States Constitution.

REGULATION INVOLVED

Section 415.071 of the California Department of Corrections Manual which provided as of the dates involved in this case as follows:

> "Press and other media interviews with specific individual inmates will not be permitted."

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution commands that freedom of the press be given the broadest scope that can be countenanced in an orderly society. *Bridges* v. *California,* 314 U.S. 252, 86 L.Ed. 192 (1941). First Amendment freedoms necessarily carry with them the right to engage in all activities fundamental to their fullest realization, including the right to receive and distribute information as well as the right to speak or print. *Griswold* v. *Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). Government denial of press access to consenting newsworthy sources of information constitutes

an indirect means of limiting the information which the press might publish and the public may receive. Indirect means of stifling First Amendment freedoms by Government are as constitutionally invalid as more heavy handed frontal attacks on such freedoms. *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960).

The District Court in the instant case specifically found that there was no overriding or compelling state interest which would justify infringement of First Amendment freedoms of the affected prisoners. *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D.Cal. 1973). That finding constitutes an implicit finding that there is no legitimate governmental interest sufficient to justify abridgment of any First Amendment rights which may be possessed by the press. Where there is no substantial and overriding valid governmental purpose which justifies infringement of protected freedoms, governmental activities having that effect are constitutionally invalid. *Griswold* v. *Connecticut*, 381 U.S. 479 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). This Court has previously stated that news gathering is not without First Amendment protection and that governmental activities which disrupt reporters' relationships with their news sources and have insufficient governmental purpose would have no justification. *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972) at 408 U.S. 707-708. That reasoning requires a holding that complete denial of interviews requested with consenting inmates is constitutionally invalid.

The District Court's holding that the press has no First Amendment right to seek out and obtain interviews with consenting prisoners dilutes and largely makes ineffectual its other holding which was that prisoners have a First Amendment right to request and be interviewed by representatives of the press. It is a fundamental concept that where certain basic First Amendment rights are concerned,

the maximum encouragement and development of those rights are to be protected. *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). The broad principle stated in *NAACP* v. *Button, supra,* is not satisfied by a holding which would tend in practice to inhibit recognized First Amendment rights of prisoners to speak and be heard, since, as pointed out in Appellants' jurisdictional statement, many inmates possessing meaningful and relevant information who would consent to be interviewed would hesitate to take the extra step and actively seek out reporters for purposes of giving interviews.

The District Court's finding that there was no justifiable state interest to prevent prisoners who wanted to be interviewed by the press from giving such interviews is wholly inconsistent with its adherence to and application of the holding in *Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F.2d 1062 (9th Cir. 1973) which was founded on a different factual basis. Moreover, the District Court's holding as regards First Amendment rights of the press is based upon a misreading of *Washington Post Co.* v. *Kleindienst,* 357 F.Supp. 770 (D.D.C. 1972) remanded which directions at 477 F.2d 1168 (D.C.Cir. 1972) opinion on remand 357 F.Supp. 779 (D.D.C. 1972) affirmed in *Washington Post Co.* v. *Kleindienst,* No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974). Finally, the District Court's holding, considering the facts upon which such holding is based, is inconsistent with the reasoning and holding of the vast majority of other courts in cases based upon similar facts. *Washington Post Co.* v. *Kleindienst, supra; Houston Chronicle Publishing Co.* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973); *Globe Newspaper Co.* v. *Bork,* Civil Action No. 73-3748-G in the United States District Court for the District of Massachusetts (February 12, 1974); *McMillan* v. *Carlson,* Civil Action No. 72-2551-M, United States District Court,

District of Massachusetts (December 31, 1973); *Burnham* v. *Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972); *c.f. Yarish* v. *Nelson,* 27 Cal.App.3d 893, 104 Cal.Rptr. 205 (Ct.App.1st Dist. 1972); *contra Mitford* v. *Pickett,* 363 F.Supp. 975 (E.D.Ill. 1973).

ARGUMENT

I.

State Denial of Press Access to All Prisoners Who Consent to Personal Interviews is Prohibited by The First Amendment to the United States Constitution.

The state regulation herein attacked absolutely prohibits all but random press interviews of inmates in California penal institutions. *Hillery* v. *Procunier,* 364 F.Supp. 196 (N.D.Cal. 1973) at 199. The regulation has that effect even in instances where an inmate affirmatively consents to an interview requested by the press. *Hillery* v. *Procunier, supra,* at 197.

The regulation in question is not restricted to interviews with inmates who might be troublemakers, to institutions at which there are serious security problems, or to interviews which present severe and meaningful administrative problems for the institution in question. Moreover, the findings of the District Court provide no support for the proposition that the regulation in question has a meaningful effect in reducing administrative burdens, in enhancing the security of the state's penal institutions, in advancing rehabilitation or in preventing notoriety for prison celebrities or "big wheels".

In light of these facts and the failure of the District Court to find that the regulation is justified on the basis of compelling and overriding legitimate governmental interest,

it must be concluded that the regulation herein attacked sharply and clearly poses the question whether the press possesses any First Amendment right to gain access to consenting prison inmates for purposes of conducting news gathering interviews.

Although the District Court dismissed First Amendment claims of the press on grounds that such claims were based upon an alleged right for "special news-gathering privileges", 364 F.Supp. 196 at 199, the First Amendment question raised by the press cannot be disposed of so easily. The District Court's holding in this regard was based, first, upon a misunderstanding of the United States Bureau of Prison regulation declared unconstitutional in *Washington Post* v. *Kleindienst,* 357 F.Supp. 770 (D.D.C. 1972) and, second, upon a failure to recognize that the press was seeking only the same degree of access to prison inmates already possessed by many members of the public.

The District Court attempted to distinguish *Washington Post* on grounds that the Bureau of Prison regulations attacked therein prevented all press access to prisoners as distinguished from the California regulation in question which permitted random press access to prisoners. Such a distinction will not bear scrutiny, for the Bureau of Prison regulation brought in question in *Washington Post,* Policy Statement 1220.1A, dated 2-11-72, provides in part as follows:

> "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. *However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to discussion of institutional facilities, programs and activities.*" [emphasis added]

The court deciding *Washington Post Co.* recognized that random conversations with individual inmates were allowed under the Bureau regulations in question. 357 F. Supp. 770, at 773.

The holding that the press is seeking special access to sources not available to other segments of the public is not justified on the facts found by the court in the instant case, for the District Court noted that hundreds of private citizens visit inmates in California penal institutions every day and as many as 10,000 persons visit San Quentin every year for a large variety of reasons. 364 F.Supp. 196 at 203.

The California regulation in question denies to the press and other media an access to California inmates which is available to many other members of the public. Such denial appears on the face of the regulation to be based solely upon the purposes of the profession in which newsmen are engaged. Selective exclusion from forums open to some members of the public where based upon content alone are impermissible under the First Amendment. *Police Department* v. *Mosley,* 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

The right of the press to gain access to prisoners which is at least equal to access given other members of the general public is supported by reasoning found in *Houston Chronicle Publishing Co.* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973) where the Court stated that:

> "It goes without saying that the general public is not allowed into jails; the security problems are obvious. But that fact does not compel the conclusion that the press should be categorically excluded from the jail, for the simple reason that certain members of the general public, to wit, friends, family, and attorneys, are for good reason allowed into jails for the purpose

> of seeing the inmates face-to-face. In the absence of a compelling State reason why the press should be excluded, the first amendment is good enough reason to allow the press into jails." at 364 F.Supp. 725.

The issue is not whether the press is seeking special access to information not otherwise available to members of the public, for it is clear from the opinion of the District Court that members of the public do have frequent and wide ranging access to inmates in California penal institutions. The true question is whether California may by regulation prohibit *all* interviews specifically requested by members of the press with consenting inmates.

By prohibiting interviews requested by the press with consenting inmates, the regulation in question operates to prevent the press from obtaining information which such interviews would have furnished. Information thereby made unavailable to the press obviously cannot be printed and published by it and is consequently unavailable to the public. The regulation in question constitutes, therefore, a complete system of prior restraint of expression. Any system of prior restraint of expression is subject to a heavy presumption against its constitutional validity. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631 (1963) at 372 U.S. 70. The complete and total ban on interviews of specific consenting inmates by the press contained in the regulation in question goes far beyond the narrow and specific limitations on the right to receive information and ideas found justifiable in *Kleindienst* v. *Mandel,* 408 U.S. 753, 33 L.E.2d 683, 92 S.Ct. 2576 (1972) and *Zemel* v. *Rusk,* 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271, reh den, 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 17 (1965) which were justified by overriding and legitimate governmental interest. As noted above, the Court in the instant case did not find such overriding legitimate governmental interest to be

present and the regulation in question is clearly not limited to those situations in which such compelling and overriding governmental interest might be present.

The purpose of allowing access to information, generally, and press access to news sources, specifically, is because discussion and dissemination of information from diverse and antagonistic sources is essential to the welfare of the public in a free society. *Associated Press* v. *United States*, 326 U.S. 1 (1945). This Court has long recognized the importance of the first of these two components of the First Amendment sought to be protected herein, i.e., the right to receive information. *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969); *Martin* v. *City of Struthers*, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943).

The right restrained and prohibited by the regulation in question is clearly that of receiving information rather than some activity to which the receipt of information is only incidental. See *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271, reh den, 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 17 (1965). Moreover, the First Amendment right to receive information is abridged in this instance solely by a governmental regulatory interest rather than a plenary governmental power such as found in *Kleindienst* v. *Mandel*, 408 U.S. 753, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972).

The right to receive information to be obtained from inmates in penal institutions is not a right exclusive to the press, of course. It is expected that the press will publish such information so that it will ultimately be received by the public which has a vital interest in the administration of prisons. That right of the public has been recognized even in cases in which press access to consenting prisoners has been denied. In *Seattle-Tacoma Newspaper Guild* v. *Parker*, 480 F.2d 1062 (9th Cir. 1973), the Court stated the interest of the public as follows:

> "Federal prisons are public institutions, and their administration is a matter of concern to all citizens. Decisions recognizing 'the paramount public interest in a free flow of information to the people concerning public officials, their servants', are equally applicable in the realm of prison administration. The importance of the media in providing public information about the conduct of these institutions is undisputed. Indeed, it has often been through the zealous efforts of the news media that failures in a particular institution have been exposed." at 480 F.2d 1066.

In affirming the right of the press to gain access to prison inmates for purposes of conducting interviews, the Court in *Burnham* v. *Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972) justified its holding as follows:

> "Prison inmates live out of the public's sight and hearing. Opportunity for shoddy treatment and bureaucratic abuse exists. Access by the news media to the inside of prisons is the most effective way to give meaning to the rule that an inmate has the right to communicate and to the rule that the public has a right to know what goes on within prison walls. News interviews can expose failures and abuses in particular institutions and the public attention which results can lead to corrective measures and reform." at 342 F.Supp. 886.

The second component of the right sought to be protected by Appellants herein, i.e., the right of the press to First Amendment protection for its news gathering activities, has previously been recognized explicitly by this Court. In *Branzburg* v. *Hayes,* 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 the Court stated that:

> "We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for

> First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated." at 408 U.S. 681.

Throughout *Branzburg, supra,* this Court continually stressed the importance of protection of news gathering as a First Amendment right.

> "Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purpose of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." at 408 U.S. 707.

This Court has on numerous occasions recognized that protection of specified First Amendment rights requires protection of all activities incidental thereto. *Griswold* v. *Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); *Talley* v. *California,* 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960); *NAACP* v. *Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S. Ct. 1163 (1958).

It is patently obvious that without protection for its news gathering activities the press cannot fulfill the role it must perform to satisfy the purposes for which the First Amendment was enacted. Freedom to print and publish without a corresponding right to aggressively seek out news to be so printed and published would indeed be a hollow and meaningless concept. A press which is not free to send its reporters into places or to news sources which are not legally privileged from disclosure of information would clearly fail to perform a useful function in a free society. This is particularly true when the news

sources or the place in which news sources are located pertain to or relate to governmental activities. Mr. Justice Black very eloquently stated the intended relationship between government and the press in his concurring opinion in *New York Times Co.* v. *United States*, 403, U.S. 713, 29 L.Ed.2d 822, 91 S.Ct. 2140 (1971) when he stated:

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of Government and inform the people." at 403 U.S. 717.

Prison administration is one of those areas of governmental activity which is particularly important for public examination and scrutiny. One of the principal sources of information about prisons would obviously be the inmate population of prisons who have a peculiar knowledge of the impact of prison policies and procedures upon those persons for whom they are intended. This principal has been recognized by lower courts which have recognized the interest of the public under the First Amendment in a free circulation of information about prison conditions and policies. *Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Globe Newspaper Co.* v. *Bork*, Civil Action No. 73-3748-G in the United States District Court for the District of Massachusetts (February 12, 1974); *Washington Post Co.* v. *Kleindienst*, 357 F.Supp. 770 (D.D.C. 1972) affirmed in *Washington Post Co.* v. *Kleindienst*, No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974); *Burnham* v. *Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).

The alternative means of news gathering from prisoners in California penal institutions provided by correspondence or random interviews conducted in the course of prison visits by reporters are not adequate to satisfy the protection of the rights of the press and the public contained in the First Amendment. The District Court noted in the instant case that only face-to-face interviews can accomplish the objectives of obtaining information from inarticulate inmates and of verifying the stories of inmates. *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D. Cal. 1973) at 364 F.Supp. 201. This Court itself has recognized the importance of the sustained face-to-face interview as an information gathering device. *Kleindienst* v. *Mandel*, 408 U.S. 753, 33 L.Ed.2d. 683, 92 S.Ct. 2576 (1972) at 33 L.Ed.2d 693. The United States Court of Appeals for the District of Columbia in *Washington Post Co.* v. *Kleindienst, supra*, explained in some detail why random interviews and correspondence are not satisfactory alternatives to private face-to-face interviews for news gathering purposes:

> "The evidence disclosed a number of characteristics common to news reporting in general, as well as certain factors unique to the prison setting, that make personal interviews particularly critical to accurate reporting in that context. In general, the testimony indicated that responsible journalists are reluctant to publish a story without first speaking personally to the source of the information in order to assess its credibility and reliability. Even when the story will not be attributed to the person from whom it came, journalists consider this form of verification an essential element of responsible reporting.
>
> The general importance of personal inquiry in order to check a news story is heightened in the context of prison institutions. The percentage of functional illiterates in the inmate population tends to be high. This minimizes the effectiveness of the mail services as a

vehicle for news gathering. Many of the inmates simply cannot communicate by that medium; some of the others who try are only able to read press inquiries and compose responses with the assistance of the more educated inmates. The literacy problem aside, communication by mail lacks the spontaneity and flexibility of a personal interview, and denies the reporter the ability to follow a thought. A personal interview gives feel and depth perspective.

Nor does the Bureau's policy of permitting press tours and conversations incidental thereto appear to plug the information gaps produced by the prohibition of press interviews. Conversations initiated pursuant to press tours are of necessity random and sporadic in nature, and are considerably more limited in time and permissible scope of discussion. Moreover, the tour conversations often occur with groups rather than with individual inmates. This both inhibits the newsman's ability to make a careful assessment of the credibility of individual inmates and imposes significant peer group pressures on inmates to inflate or adapt their stories to correspond to the perceived desires of their fellow prisoners."

(Slip opinion dated February 21, 1974, pp. 11-12)

Other courts have come to similar conclusions regarding the importance of face-to-face interviews as a necessary news gathering device in a prison context. *Houston Chronicle Publishing Co.* v. *Kleindienst*, 364 F.Supp. 719 (S.D.Tex. 1973); *McMillan* v. *Carlson*, Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts (December 31, 1973); *Burnham* v. *Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).

The importance of a face-to-face interview as a necessary element of news gathering has been clearly established in the instant case and by reasoning of other cases dealing with exactly the same question. The burden imposed upon

news gathering by prohibition of face-to-face interviews, therefore, is not the uncertain and questionable limitation upon news gathering found by this Court in *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 wherein the Court stated that:

> "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury . . . the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen." at 408 U.S. 693.

Where all interviews between reporters requesting such interviews and consenting inmates are prohibited, the restriction on news gathering is manifest. There is no speculation required to determine that the entirety of information which would have been furnished by private face-to-face interviews is thereby eliminated. The fact finding of the District Court below, the reasoning of other courts dealing with the same question and general knowledge of the public regarding the importance of the face-to-face interview as an information gathering source all combine to make it clear that the regulation in question does constitute a severe and meaningful restriction on the news gathering activities of the press and therefore operates to reduce or eliminate information which the public would otherwise receive.

The California regulation in question absolutely prohibits all interviews by the press with specified consenting pris-

oners. The regulation makes no exceptions for the nature of the prisoner, the nature of the institution, prevailing conditions in the institution, administrative burdens or other matters which might relate to the difficulty, safety or convenience of allowing interviews to be conducted. The regulation is indistinguishable from regulations of the United States Bureau of Prisons found unconstitutional in such cases as *Washington Post Co.* v. *Kleindienst, supra, Houston Chronicle Publishing Co.* v. *Kleindienst, supra, McMillan* v. *Carlson, supra, and Globe Newspaper Co.* v. *Bork, supra.* The right of the press and the public to receive information and the right of the press to protection for its news gathering activities have been recognized as a right protected by the First Amendment to the United States Constitution, *Branzburg* v. *Hayes, supra.* The regulation constitutes a prior restraint on expression and there is no finding by the Court below which would justify such prior restraint of expression. The face-to-face interview is a vital, important and in many instances the only effective means of news gathering. There is no meaningful alternative in a prison context to face-to-face interviews. The regulation, therefore, severely and meaningfully abridges news gathering activities of the press and impinges on the First Amendment rights of both the press and the public. Accordingly, the California regulation which denies press access to all prisoners who consent to personal interviews is prohibited by the First Amendment to the United States Constitution.

II.

Absent an Overriding and Compelling State Interest, Denial of Press Access to Prisoners for Personal Interviews Constitutes Denial of First Amendment Rights of the Press.

The District Court recognized that where First Amend-

ment rights are concerned, the State must be able to show a compelling interest in support of any regulations impinging on such rights.

> "It is a fundamental precept of constitutional law that when a state restricts a First Amendment right, especially when that restriction, is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation." *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D.Cal. 1973) at 364 F.Supp. 201.

This statement of the Court below was by no means a novel expression of the concept that only a compelling state interest will justify infringement upon First Amendment freedoms. This Court has frequently and consistently held that only vital governmental interests can justify infringement of First Amendment freedoms and that any governmental infringement upon First Amendment freedoms will be carefully scrutinized to determine if it is in fact supportive of vital governmental interests and is as narrowly and precisely drawn as is possible. In *United States* v. *Robel*, 389 U.S. 258, 19 L.Ed.2d 508, 88 S.Ct. 419 (1967), the Court declared an act of Congress unconstitutional on grounds that it constituted an overbroad limitation upon the exercise of First Amendment freedoms, even though the statute was intended to accomplish a justifiable governmental end, i.e., national security. The vice of the statute in question in the *Robel* case was that it prohibited exercise of First Amendment freedoms where the government had no legitimate interest.

> "That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made

> irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of §5(a)(1)(D) may occupy a nonsensitive position in a defense facility. Thus, §5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment right." at 389 U.S. 265-266.

The term "overbreadth" is frequently used by courts when describing the operation of government regulations which impinge upon First Amendment freedoms without adequate justification of compelling state interests. *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405. 83 S.Ct. 328 (1963) at 371 U.S. 433. The vice of overbreadth where First Amendment freedoms are concerned is to inhibit as well as absolutely prevent exercise of protected freedoms. *Muller* v. *Conlisk*, 429 F.2d 901 (7th Cir. 1970). Only a compelling state interest in prohibiting all proscribed behavior will justify government regulations impinging on First Amendment freedom. *Police Department* v. *Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960) at 361 U.S. 524.

Governmental regulations restricting or threatening to restrict the exercise of First Amendment freedoms cannot be justified merely because such regulations may be part of the exercise of other legitimate powers. Such regulations

must themselves be reasonably related to the governmental purpose which is an overriding compelling interest. *Bates* v. *Little Rock, supra.*

When speaking of the rights of prisoners to be interviewed by the press, the Court below recognized these concepts.

> "Defendants cite *Carothers* v. *Follette*, 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both 'reasonably . . . and necessarily . . . to the advencement of some justifiable purpose of imprisonment.' 314 F.Supp. 1024. The court believes that this rule is not only consistent with the 'compelling interest' test, it is concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect limitation must be related — 'reasonably and necessarily' — to the end sought." *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D. Cal. 1973) at 364 F.Supp 201-202.

Despite its recognition that the state must show both a compelling interest in limiting First Amendment rights and must demonstrate that the method it chooses to effect that limitation is necessarily and reasonably related to the end sought, the Court below failed to apply that standard in its consideration of the asserted First Amendment rights of the press. As noted above, the Court below did not find that prohibiting all press and media interviews with specific prisoners furthered the attainment of any legitimate state interest in the administration of its penal institutions, such as reducing administrative burdens, enhancing security, furthering rehabilitation, limiting notoriety accorded to prison celebrities or "big wheels" or any other legitimate government interest. In fact, the Court specifically found that Defendants failed to show that any of such interests were furthered by the regulation in question.

"And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at the hearing that 'hundreds' of private citizens visit the California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past; and they have conspicuously failed to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

Prison security is patently a legitimate concern of the defendants, but §415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it." 364 F.Supp. 196 at 203.

The Court also distinguished *Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F.2d 1062 (9th Cir. 1973) on grounds that the *Seattle-Tacoma* prison officials had made a considerable study of the interview practice and that the regulation was upheld only for McNeil Island Penitentiary, a maximum security institution for prisoners who presented serious disciplinary and security problems whereas the California regulation in question was applied statewide to all California penal institutions. The Court also distinguished *Seale* v. *Manson,* 326 F.Supp. 1375 (D.Conn. 1971) on grounds that the regulation attacked in *Seale* was one which limited rather than totally excluded interviews and on further grounds that the Plaintiff in the *Seale* case did not disclaim his reputation as a "wheel" whereas in the instant case the information officer for the Department

of Corrections testified that he was at the present time unable to name a single celebrity throughout the entire California correctional system.

The findings of the Court below lead inescapably to the conclusion that there are no overriding and compelling state interests which would justify the total prohibition on interviews of specific consenting inmates when requested by the press. The Court rejected as distinguishable the holdings in other cases which had upheld limitations upon interviews of prisoners in penal institutions. The concurring opinion of Circuit Judge Hamlin which applied the "rational basis" analysis to determine whether the regulation in question would be a justifiable infringement upon First Amendment freedom of prisoners similarly found that the record in the instant case had insufficient evidence to justify the complete ban imposed upon interviews.

Accordingly, since news gathering is a protected First Amendment freedom and since the Court below has failed to find sufficient state interest in infringing upon that freedom and has, in fact, found that there is no justifiable state interest in infringing upon First Amendment freedoms by means of complete ban on press interviews of consenting prisoners, the California regulation in question should be declared unconstitutional by this Court.

III.

The First Amendment Rights of Prisoners to be Interviewed Cannot be Adequately Realized Unless the First Amendment Right of the Press to Seek and Obtain Interviews from Consenting Prisoners is Adequately Protected.

The Court below upheld the contentions of the inmate prisoners that §415.071 of the California Department of Corrections Manual unconstitutionally infringed upon First

Amendment rights of prisoners. The Court, further, ordered that Defendants permit the specific interviews sought by the Plaintiff prisoners at the earliest practicable time under reasonable conditions and supervision. At the same time, the Court dismissed the complaint of the media Plaintiffs for failure to state a claim upon which relief can be granted.

The holding of the District Court can be read to permit interviews between members of the press and prisoners only when such interviews were initially requested by the prisoners. Although other readings of the opinion of the Court are possible, and certainly preferable, it will be assumed for purposes of this section that the holding has that effect. Thus we are left with the anomalous situation whereby prisoners who might be aware of the holding of the District Court or who might for personal reasons desire to have interviews are free to request such interviews and be interviewed, but where the press cannot actively seek out and obtain interviews of consenting prisoners. State prison authorities apparently would be free to disregard requests of the press for interviews with specific inmates and would, presumably, have no obligation to pass such requests on to the inmates in question.

Such a situation, apart from its obvious abridgment of the First Amendment rights of the press, as stated above, fails to adequately vindicate the First Amendment freedom of prisoners. First, it is a widely known fact that many prisoners are either illiterate or semi-literate at best. Many prisoners, therefore, will be wholly unaware of their First Amendment right to seek out the press and be interviewed, whether by mail or verbal request. Further, such inmates

will in all likelihood have little or no knowledge of the press or other media and would have, therefore, no idea which representatives of the media should be contacted to allow the prisoner his maximum exercise of the recognized First Amendment right. Second, many inmates although willing to consent to personal interviews and therefore contribute to the flow of information, would not be so strongly motivated as to actively seek out the press. See *e.g. McMillan* v. *Carlson,* Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts (December 31, 1973).

The illiteracy or functional illiteracy of the inmate population in penal institutions tends to be high. See *Washington Post Co.* v. *Kleindienst,* No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974), Page 11 of the slip opinion of the Court. Consequently, prisoners will not know the names of many publications, much less the reporters for those publications. Semi-literate or functionally illiterate prisoners will not be able to correspond in writing effectively so as to communicate with those members of the press or other media who might have an interest in interviewing the prisoner in question. Further, a prisoner who is unaware of his legal right to be interviewed would never reach such a hurdle in the first place.

Unless prison authorities undertake continuing programs to educate prisoners of the existence of the First Amendment right in question, a highly unlikely and improbable expectation, prisoners' exercise of the First Amendment right sought to be protected by the Court below will not be given that broad scope approved by this Court in *Bridges* v. *California,* 314 U.S. 252, 86 L.Ed. 192 (1941). Moreover, while not casting any aspersions upon any par-

ticular prison administrators, it is true, as recognized in *Burnham* v. *Oswald*, 342 F. Supp 880 (W.D.N.Y. 1972) that:

> "There have been too many instances in the past when interviews were denied simply because they were inconvenient. Prison inmates live out of the public's sight and hearing. Opportunity for shoddy treatment and bureaucratic abuse exists. Access by the news media to the inside of prisons is the most effective way to give meaning to the rule that an inmate has the right to communicate and to the rule that the public has a right to know what goes on within prison walls. News interviews can expose failures and abuses in particular institutions and the public attention which results can lead to corrective measures and reform." 342 F.Supp. at 886.

Only by allowing the press to initiate interviews can the difficulties that prisoners might otherwise have in exercising their First Amendment rights be eliminated or minimized.

In some instances, an inmate will have information which would be of great interest to the public and which the inmate would be willing to divulge in an interview with a reporter or researcher but which would not be of such nature as to prompt the inmate to actively seek out a reporter. An example of that type situation is found in *McMillan* v. *Carlson*, Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts. The Plaintiff in that case sought to interview John Larry Ray, an inmate at the United States Penitentiary at Levenworth, Kansas for purposes of obtaining information to be included in the biography of the inmate's brother, James Earl Ray, the convicted killer of Martin Luther King. The U. S. Bureau of Prisons interpreted its regulation so as to include authors along with the press and other news media in the group which are prohibited from face-to-face interviews with Federal inmates. Noting

that the purpose of the interview was to elicit information of the ideas and experiences of a third person bearing upon a tragic political event of the 1960's, the Court found the Federal prison prohibition against face-to-face interviews unconstitutional and ordered that the interview requested be held, subject only to reasonable provisions as to time and place. In such a situation, it is highly unlikely that the inmate in question would have requested an interview even though he possesses information of relevance and importance to the public at large. Indeed, it is highly unlikely that the inmate in question would have even known of the existence of the author-Plaintiff in *McMillan* had not McMillan instituted the request in the first instance.

The facts of the *McMillan* case demonstrate that ideas and information in the possession of inmates which the inmates would willingly consent to divulge to the press, and hence to the public, are unlikely to be so divulged unless the press itself is given the right to initiate requests for interviews.

Since prisoners are not likely to effectively exercise their First Amendment rights to seek and have interviews with the press, whether it be due to lack of education, ignorance of such rights, insufficient knowledge about which members of the press should be contacted for interview purposes or lack of initial motivation to initiate the interview process, prisoners' First Amendment rights are not likely to be exercised to the fullest extent envisoned by the Founding Fathers and the many cases interpreting the First Amendment unless the press be accorded an equal right to seek and obtain interviews with consenting inmates. The First Amendment rights of prisoners, the press and the public have been recognized to be truly inseparable when the starting point is the right of the prisoner to be heard.

Nolan v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) at 547-548; *Guajardo* v. *Beto*, 349 F.Supp. 211 (S.D.Tex. 1972).

Accordingly, even if the press had no independent First Amendment right to engage in news gathering through the means of face-to-face interviews with consenting prison inmates, nevertheless this Court should hold that the First Amendment requires a recognition of that right for the purpose of fullest vindication of the prisoners' right to be interviewed by the press which has been upheld and sustained by the Court below.

CONCLUSION

An absolute ban on press interviews with consenting inmates violates the First Amendment rights of the press to engage in all those activities necessary to printing and publishing. Such a ban constitutes a prior restraint of expression.

No satisfactory alternative to personal interviews exists and the ban, therefore, constitutes a significant constriction of the flow of news to the public. The ban is not limited to particular institutions, inmates, situations or other conditions which might possibly justify limitation on personal interviews between inmates and the press. No compelling state interest has been shown for its overbroad restriction on First Amendment rights. The Court below has in effect found that there is no such compelling interest on the facts of this case. Finally, prohibiting newsmen from initiating interviews with consenting inmates results in a dilution of the exercise of the First Amendment right to speak and be heard which the Court below has recognized on the part of prisoners. If for no other reason than this, the press should be allowed to initiate and seek out interviews with consenting inmates.

For reasons stated above, the Houston Chronicle Publishing Company as *amicus curiae* suggests that this Court should hold the California regulation banning interviews by the press with specific consenting inmates to be in violation of the First Amendment to the United States Constitution, should reverse their judgment of the Court below dismissing the media-Plaintiff's complaint and should hold that press interviews with consenting inmates can only be prohibited where it is the judgment of the prison administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems.

Respectfully submitted,

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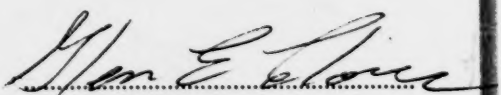
CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of March, 1974, two copies of the Brief of Houston Chronicle Publishing Company, *Amicus Curiae,* were mailed, postage prepaid, certified mail, return receipt requested, to John T. Murphy, Deputy Attorney General, State of California, State Building San Francisco, California 94102, Counsel for the Appellees and Herman Schwartz and Edward I. Koren, National Prison Project of the American Civil Liberties Foundation, 525 O'brian Hall, North Campus, State University of New York at Buffalo, Amherst, New York 14260, counsel for Appellants. I further certify that all parties required to be served have been served.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-918

EVE PELL, *et al., Appellants*

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al., Appellees.*

On Appeal from the United States District Court for the Northern District of California

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BRIEF OF THE WASHINGTON POST COMPANY, THE MIAMI HERALD PUBLISHING COMPANY, THE MINNEAPOLIS STAR AND TRIBUNE COMPANY, NEW YORK NEWS, INC., AND THE TIMES MIRROR COMPANY, AMICI CURIAE, IN SUPPORT OF REVERSAL

The Washington Post Company, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., The Minneapolis Star and Tribune Company,

New York News, Inc., and The Times Mirror Company submit this brief as *amici curiae* in support of appellants' appeal from the judgment of the United States District Court for the Northern District of California entered on August 16, 1973. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(1) of the Rules of this Court. Copies of the letters of consent are being filed with the Clerk and are appended to this brief.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is reported as *Hillery* v. *Procunier,* 364 F. Supp. 196 (N.D. Cal. 1973) (3-judge court).

JURISDICTION

The order of the district court was entered on August 16, 1973. This Court noted probable jurisdiction on January 21, 1974. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

California Department of Corrections Manual § 415.071 provides:

> "Press and other media interviews with specific individual inmates will not be permitted."

QUESTION PRESENTED

Whether, under the First Amendment, a state may prohibit all interviews between any member of the press and any prison inmate designated in advance, at all its penal institutions, under all circumstances, and at all times.

INTEREST OF THE AMICI

The Washington Post Company publishes *The Washington Post,* a daily newspaper of general circulation. It is the parent of subsidiary corporations that operate radio and television stations. Through another subsidiary it also publishes *Newsweek,* a nationally and internationally distributed news magazine. The Washington Post Company is also a party in *Saxbe* v. *Washington Post Co.,* No. 73-1265, *cert. granted* (Mar. 4, 1974), which presents a question similar to that in the instant case. The instant brief was prepared prior to the granting of certiorari.

The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., publishes *The Miami Herald,* a daily newspaper of general circulation.

The Minneapolis Star and Tribune Company publishes *The Minneapolis Tribune,* a daily newspaper of general circulation.

New York News, Inc. publishes *Daily News* and *Sunday News,* New York City, which have the largest daily and Sunday newspaper circulation in the United States.

The Times Mirror Company publishes *The Los Angeles Times,* a daily newspaper of general circulation.

STATEMENT

Appellants Eve Pell, Betty Segal and Paul Jacobs are, respectively, a freelance journalist, a newspaper reporter, and a television reporter. Appellees Raymond K. Procunier, Louis S. Nelson, James W. L. Park, and Joseph R. O'Brien, are, respectively, Director of the California Department of Corrections, Warden of the California State Prison at San Quentin, Associate Warden at San Quentin, and Public Information Officer at San Quentin. Each appellant requested an interview with an inmate at San Quentin State Prison in California. These inmates are appellees in No. 73-754, *Procunier* v. *Hillery*.[1] Appellees denied these requests pursuant to § 415.071 of the California Department of Corrections Manual, which flatly prohibits any interview between any member of the press and any "specific individual inmate" at any California penal institution under any circumstances at any time. California penal institutions house approxmately 20,000 inmates.

California policy does permit newsmen to enter prisons and interview randomly-selected inmates. However, it does not appear that there is any policy permitting such interviews to be outside the hearing of prison officials and other inmates, unrestricted as to subject matter, and in-depth. Apparently such aspects of random interviews are determined by *ad hoc* exercise of discretion. See Joint Appendix 242-44. More-

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[1] Appellants in the instant case appeal from the decision below that they, as newsmen, have no First Amendment right to interview inmates willing to be interviewed. Appellants in No. 73-754 appeal from the decision by the same court in the same case that inmates have a First Amendment right to be interviewed by newsmen willing to interview them.

over, because of § 415.071, a newsman who needs to interview a particular inmate about a particular subject matter is prohibited from doing so. News stories that depend on such interviews cannot be written.

The 3-judge district court, citing no decision of this Court other than *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), held that newsmen have no First Amendment right to gather news by interviewing inmates. Without considering whether *any* state interest supports § 415.071, the court upheld it in its full breadth as to newsmen. The court went on to hold that § 415.071 unconstitutionally denies *inmates* their First Amendment right to be interviewed, that it is not supported by any compelling state interest, and that it is overbroad.

SUMMARY OF ARGUMENT

The First Amendment protects the public's right to be informed by the press about matters of public interest, including prisons. On many occasions this Court has recognized the fundamental importance of an informed public and the special role of the press under the First Amendment as informer of the public. Because prisons are important public institutions, the public's interest in being informed about them is at least as strong as its interest in being informed about other governmental matters. Because prisons are not freely open to the public, the informing function of the press is particularly important as to them. There is no other source of public information concerning prisons which can substitute for press reports. Because of restraints on press coverage of prisons, prisoner lawsuits have become a major force for prison

reform. This case presents an important opportunity for this Court to help activate the *political* process on issues of penal reform by enabling the press to report effectively to the public.

The right of the press to gather news is an indispensable element of the public's First Amendment right to be informed about matters of public interest. This general principle was recognized in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), but the decision in the instant case cannot be made by reference to *Branzburg,* but only by weighing the competing press and state interests.

Section 415.071 directly and severely restricts news gathering by denying the press the use of a critical news gathering method. All that is claimed by the press in this case is a right of a newsman to associate with a willing prisoner in a private in-depth interview for purposes of news gathering, subject to reasonable prison regulations as to time, place and manner. This is the same right that is enjoyed by relatives, friends, lawyers, clergymen, public officials and others who visit newsmen. Accordingly, this case can be decided very narrowly.

The opportunity for private in-depth face-to-face interviews is critical for accurate and effective news gathering. Such interviews are significantly superior to all alternative methods of news gathering because they are flexible in format, permit an evaluation of demeanor, allow pursuit of topics, do not involve the kind of delays associated with mail, and can be used to communicate with illiterate inmates. Letters, casual conversations, group interviews, interviews with randomly selected inmates, and statements from prison

officials do not obviate the critical need for private uncensored in-depth face-to-face interviews with individual inmates designated in advance.

No compelling governmental interest supports § 415.071's total ban on all press interviews with prisoners designated in advance.

Press interviews do not create undue administrative burdens. Jurisdictions that permit press interviews have not experienced such burdens. The number of press interviews likely to occur in any jurisdiction is insignificant when compared to the number of other interviews regularly permitted. Any undue burden from press interviews can be eliminated by reasonable, non-discriminatory regulations.

Newsmen are no more likely to endanger prison security than are relatives, friends, lawyers, clergymen, and others who visit prisoners. The same security precautions that are applied to other persons entering prisons for visits can effectively be applied to newsmen.

The "big wheel" theory cannot justify a total ban on all press interviews with all prisoners designated in advance, regardless of whether the inmates are actual or potential big wheels. The big wheel theory has no precise meaning. The reason for its focus on interviews with designated inmates, to the exclusion of all other ways that inmates gain status, is unclear. A narrowly and precisely drawn regulation can protect whatever state interests are genuinely reflected in the big wheel theory, while generally permitting press interviews with the vast majority of inmates.

A policy generally permitting press interviews with inmates would not significantly disturb any state inter-

est in uniformity of treatment of inmates. Director Procunier himself would reject a uniform policy on press interviews on penological grounds. He adopted the present uniform prohibition only because of legal advice.

The record contains no substantial evidence showing that press interviews with inmates will impede rehabilitation.

Property law concepts are not controlling in this case. A state may not invoke property concepts to justify sealing off thousands of persons from press and public scrutiny. Since newsmen seek to use prison property only in the same way that inmates' relatives, friends, lawyers, clergymen and other visitors use it, they cannot be regarded as trespassers. In the circumstances of this case, First Amendment rights outweigh any countervailing claims of property.

A large majority of American jurisdictions for which information is available permit newsmen to interview prison inmates in some circumstances. Nearly half have policies generally permitting such interviews. The experience of these jurisdictions demonstrates that press interviews do not interfere with the achievement of correctional goals.

Appellee has failed to present any solid reason which in logic or experience supports § 415.071's total prohibition of interviews between newsmen and inmates designated in advance.

A prisoners' right to be interviewed is no substitute for a press right to interview. Prisoners may not be able or willing to initiate and pursue a request to be interviewed in the face of opposition from prison

officials. The press is in a better practical position to assert and protect the right to an interview. The interest of the press and public in having interviews with prisoners is different from that of the prisoner in being interviewed. These interests rest on different foundations in First Amendment law.

Press interviews with inmates should be permitted except where serious administrative or disciplinary problems will directly and immediately result. An interview may be denied only on the basis of an inmate's past behavior or conditions at the prison. This rule gives adequate guidance and yet leaves ample scope for the exercise of discretion by prison officials.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE PUBLIC'S RIGHT TO BE INFORMED BY THE PRESS ABOUT MATTERS OF PUBLIC INTEREST, INCLUDING PRISONS.

On many occasions this Court has emphasized that the overriding subject of First Amendment protection is the public's right to receive information and opinions concerning matters of public interest. In *Garrison* v. *Louisiana*, 379 U.S. 64, 76 (1964), the Court, per Mr. Justice Brennan, upheld "the paramount public interest in a free flow of information to the people concerning public officials, their servants." In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), it observed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), the Court, per Mr. Justice White, characterized the rights of television and radio audiences as "paramount. . . . . It is the right of the public to receive suitable

access to social, political, esthetic, moral and other ideas and experiences which is crucial here." In *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Court, per Mr. Justice Blackmun, stated: "It is now well established that the Constitution protects the right to receive information and ideas." See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

The public's right to be informed is critical to its capacity to make intelligent decisions in our democratic political system. It is also indispensable to the progress of science, the arts, the economy, and social life generally. *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 147 (1967) (plurality opinion); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 42 (1971) (plurality opinion).

This Court has also recognized many times that the First Amendment assigned to the press a unique, constitutionally protected, role as informer of the public:

> "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).[2]

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[2] The unique constitutional status of those who inform the public is entirely consistent with the application to them of laws of general scope that do not impede the performance of First Amendment functions. Thus the press is properly subject to tax laws, antitrust laws, labor laws, and the like. The special constitutional status is relevant, however, whenever, as in the instant case, a statute or regulation is directly solely at the press or directly impedes its carrying out of the informing function. *See, e.g., Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

"A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). The informing function of the press was perhaps most simply and forcefully described by Mr. Justice Black in *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (concurring opinion):

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."

Although this Court has not yet had occasion to consider the application of these principles to prisons, a majority of lower federal courts have held that they apply with the same or even greater force in the prison context than in other contexts. *See Washington Post Co.* v. *Kleindienst*, No. 72-1362 (D.C. Cir. Feb. 21, 1974), *aff'g* 357 F. Supp. 770 (D.D.C.), *stay granted*, 406 U.S. 912, *remanded*, 477 F.2d 1168 (D.C. Cir.), *on remand*, 357 F. Supp. 779 (D.D.C. 1972), *cert. granted* (No. 73-1265, Mar. 4, 1974); *Burnham* v. *Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972); *Houston Chronicle Pub. Co.* v. *Kleindienst*, 364 F. Supp. 719 (S.D. Tex. 1973), *app. dismissed*, No. 73-3590 (5th Cir. Jan. 11, 1974); *McMillan* v. *Carlson*, C.A. No. 72-2551-M (D. Mass. Dec. 31, 1973); *Globe Newspaper Co.* v. *Saxbe*, Civ. No. 73-3748G (D. Mass. Feb. 12, 1974); see also *Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971);

Palmigiano v. *Travisono*, 317 F. Supp. 776 (D.R.I. 1970).[3]

Prisons, like other public institutions, are the responsibility of elected public officials. As a critical part of the total system of criminal law adminstration, they directly affect the quality of life throughout society. Accordingly, the public's interest in being informed about prisons is at least as strong as its interest in being informed about other governmental matters. Without adequate information, the public cannot intelligently vote and make its policy preferences known. Because members of the public cannot freely enter prisons and inform themselves of conditions there, the public depends on the press for its information about prisons. As the district court pointed out in *Washington Post Co.* v. *Kleindienst, supra*, 557 F. Supp. at 773:

> "Whenever people are incarcerated, . . . opportunity for human indignities and administrative insensitivity exists. Those thus deprived of freedom live out of the public's view. It is largely only through the media that a failure in a particular institution to adhere to minimum standards of human dignity can be exposed. Indeed, needed reforms in these areas have often been sparked by press attention."[4]

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[3] *Contra*, *Seattle-Tacoma Newspaper Guild* v. *Parker*, 480 F.2d 1062 (9th Cir. 1973); *Mitford* v. *Pickett*, 363 F. Supp. 975 (E.D. Ill. 1973); *Smith* v. *Bounds*, Civ. No. 2914 (E.D.N.C. Mar. 14, 1972), *aff'd*, No. 73-1658 (4th Cir. June 8, 1973); see also *Seale* v. *Manson*, 326 F. Supp. 1375 (D. Conn. 1971).

[4] The public need for greater information about prisons for purposes of prison reform was underscored in a speech by Mr. Chief Justice Burger urging lawyers to "get in the habit of visiting prisons". Lay sermon at ABA interdenominational prayer breakfast in St. Louis, Mo., August 9, 1970. *The Washington Post*, Aug. 10, 1970.

In *Burnham* v. *Oswald, supra,* the court pointed out:

> "It is true that an inmate has a right to correspond with the court, with his attorney, with his family and with a few friends. Infrequently a private citizen may have an opportunity to visit and chat with him briefly. Members of the legislature have a right to visit and talk to inmates but, because of the press of many other duties, these visits are not often made. It is apparent that these limited avenues of communication are not good enough to bring to public attention a complete and accurate picture of prison life. The decision about what information may pass through prison walls must not be left to the administrators alone . . . . Access by the news media to the inside of prisons is the most effective way to give meaning to the rule that an inmate has the right to communicate and to the rule that the public has a right to know what goes on within prison walls." 342 F. Supp. at 885-86.

Finally, it is sometimes suggested that press interviews with inmates are unnecessary because inmates can take their grievances to court. Indeed, in recent years prisoners in increasing numbers have brought civil suits in federal courts to challenge the conditions in which they are held and the treatment they receive. See, *e.g., Holt* v. *Sarver,* 442 F.2d 304 (8th Cir. 1971); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir.), cert. denied *sub nom. Roberts* v. *Smith,* 404 U.S. 866 (1971); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971). However, courts ought not to be the principal vehicle for publicizing grievances against public officials or the principle reformers of social institutons. Under our constitutional scheme of government, the free press should be able to report grievances to the public so that *an informed public* can make its weight felt within

the *political* branches. This democratic process has not been at work in the prison context because prison officials customarily have denied the press an opportunity to present to the public a full picture of prison life, including the views of inmates obtained through in-depth interviews. Only when prison authorities remove the dam they have erected to stop the free flow of information to the public, will the tides of prisoner grievances be channeled away from the courts, and perhaps from outbreaks of violence, and into the political process where they belong. Thus, this case presents an important opportunity for this Court to help activate the political process on issues of penal reform by removing an artificial and arbitrary barrier to an informed citizenry. In so doing, the Court will be performing its traditional constitutional function. See, *e.g., Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249-50 (1936); *De Jong* v. *Oregon,* 299 U.S. 353, 364-65 (1937). For too long the courts have borne the principal burden of penal reform. The time has come to allow the press to bring information about penal conditions into the forum of public opinion.

II. THE RIGHT OF THE PRESS TO GATHER NEWS IS AN INDISPENSABLE ELEMENT OF THE PUBLIC'S FIRST AMENDMENT RIGHT TO BE INFORMED ABOUT MATTERS OF PUBLIC INTEREST.

A free press is an essential element of a democracy precisely because the individual members of the public cannot themselves, as a practical matter, gather all the information needed to exercise their political and other responsibilities. This Court's decisions on the informing function, discussed at pp. 9-11, *supra,* all recognize that the press is the agent or proxy of the public,

created to do what the public cannot do for itself. Precisely in situations (*e.g.*, prisons) where the public must for good reasons be denied unrestricted access, the press should be permitted reasonable access (absent compelling reasons to the contrary). Surely it would be ironic to deny the public access to information by means of the press on the ground that the press should have no greater rights than the general public. Indeed, if the government could, without fear of scrutiny under the First Amendment, restrict the right of the press to obtain information from sources, visit places, and observe events, the right to publish would be of little significance.[5]

It is for these reasons that this Court in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), expressly recognized that news gathering is part of the freedom of the press protected by the First Amendment:

> "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. . . . [N]ews gathering is not without its First Amendment protections." 408 U.S., at 681, 707.[6]

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[5] Regulations of the United States Department of Justice relating to subpoenas to newsmen begin with the premise that "freedom of the press can be no broader than the freedom of reporters to investigate and report the news." 28 CFR § 50.10, 38 F.R. 29588 (Oct. 26, 1973). Similarly, President Nixon has determined that newsmen shall have continued access to American military bases abroad "on a regular basis." 39 F.R. 5181 (Feb. 11, 1974).

[6] Other cases recognizing that news gathering is protected by the First Amendment are *Schnell* v. *Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Dietemann* v. *Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *Associated Press* v. *KVOS*, 80 F.2d 575, 581 (9th Cir. 1935), rev'd on jurisdictional grounds, 299 U.S. 269 (1936); *Chan-*

Of course, the Court in *Branzburg* went on to hold that in the particular circumstances of the grand jury subpoenas before it, the First Amendment protection of news gathering did not extend so far as to entitle the reporters to maintain the confidentiality of their sources. The rationale of the decision was that, in the circumstances presented, denial of a reporter's privilege of confidentiality with respect to a proper grand jury subpoena would not itself prevent a reporter from interviewing any source he desired, 408 U.S., at 681-82, and that the record failed to show that denial of the privilege would severely constrict the flow of information to the public, 408 U.S., at 690-94.

The decision in *Branzburg* turned on the weighing of the social cost of a clear and definite obstacle to a grand jury investigation against the cost of what the Court found to be an uncertain and speculative injury to the capacity of the press to gather news. The particular balance struck in *Branzburg* has no bearing on the analysis required in the instant case: the weighing of the social cost of a clear and definite obstacle to news gathering against what the court below (in the context of the prisoners' claim) found to be an uncertain and speculative injury to prison administration.

The relevance of *Branzburg* to the instant case lies in its holding that news gathering is entitled to First Amendment protection, and indeed to the protection of the normal First Amendment test requiring that regulations infringing upon First Amendment interests be narrowly and precisely drawn so as to serve only a

nel 10, Inc. v. *Gunnarson*, 337 F. Supp. 634 (D. Minn. 1972). See also the cases cited in the text at pp. 11-12, *supra*, and the cases cited in n. 7, *infra*.

compelling state interest by the means least restrictive of First Amendment interests. 408 U.S., at 700.[7] See also *NAACP* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Schneider* v. *State*, 308 U.S. 147, 161 (1939); *NAACP* v. *Alabama*, 357 U.S. 449, 464 (1958). When prison regulations infringe upon First Amendment interests, they have no special exemption from the compelling interest test, although of course the special characteristics of prisons are given due weight in applying the test. See, *e.g.*, *Nolan* v. *Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971); *Washington Post Co.* v. *Kleindienst*, No. 72-1362 (D.C. Cir. Feb. 21, 1974); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970).

The decision in the instant case must, therefore, turn on a consideration of the nature and severity of § 415.071's restriction on news gathering and of the nature and strength of California's interest in imposing a restraint as broad as that of § 415.071.

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[7] In post-*Branzburg* cases involving assertion of a newsman's privilege of confidentiality, the lower federal courts have recognized that news gathering is protected by the normal First Amendment test, and have weighed the competing interests on the particular records before them. See *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Bursey* v. *United States*, 466 F.2d 1059, 1090-92 (9th Cir. 1972); *Democratic National Committee* v. *McCord, In re Bernstein*, 356 F. Supp. 1394 (D.D.C. 1973); *Linsey* v. *Kelman* (D. Conn., Mar. 20, 1973) (N.Y. Times, Mar. 21, 1973, p. 19); see also *Carey* v. *Hume*, No. 71-1736 (D.C. Cir. Jan. 28, 1974); *United States* v. *Liddy, In re Times Mirror Co.*, 354 F. Supp. 208 (D.D.C. 1973).

III. SECTION 415.071 DIRECTLY AND SEVERELY RESTRICTS NEWS GATHERING BY DENYING THE PRESS THE USE OF A CRITICAL NEWS GATHERING METHOD.

Section 415.071 flatly and totally prohibits newsmen from interviewing any of California's 20,000 prison inmates designated in advance for the purpose of gathering news from them. The prohibition of interviews is an assertion of state power to prevent two willing persons—the journalist/interviewer and the prisoner/interviewee—from associating for the purpose of an interview, a constitutionally protected activity. *Cf. Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

The assertion of this power in § 415.071 is virtually unique since only as to persons within its physical control does a state have effective power to prevent interviews from taking place. And persons within the physical control of the state are limited to those incarcerated or housed in state institutions.

Accordingly, the First Amendment claim in this case is extremely narrow: a claim that two people who want to talk to one another for the purpose of news gathering without being overheard have a right to do so; and that the fact that one of them is a prison inmate does not negate the right, but merely means that the interview may be subjected to reasonable prison regulations as to time, place, and manner.

It should be emphasized what this case does not involve. It does not involve any claim of press access to any person who does not wish to be interviewed, and thus it does not raise any question of an invasion of privacy. Contrast *Commonwealth* v. *Wiseman,* 249 N.E. 2d 610 (Mass.), cert. denied, 399 U.S. 960 (1970) ("Titticut Follies"). It does not involve any claim of

access to any government officials, government meetings or government documents. Contrast *New York Times Co.* v. *United States,* 403 U.S. 713 (1971). It does not involve any interference with the conduct of a trial. Contrast *Estes* v. *Texas,* 381 U.S. 532, 539-40 (1965). It does not involve a claim of access to areas where exclusion of the public is required by "the weightiest considerations of national security." Contrast *Zemel* v. *Rusk,* 381 U.S. 1, 16 (1965). Nor does it involve any claim of a privilege to withhold information from an official body such as a court or grand jury. Contrast *Branzburg* v. *Hayes,* 408 U.S. 665 (1972).

Further, there is no claim in this case of a First Amendment right to enter prisons at all times and under all circumstances. It is undisputed that the special nature of prisons justifies the establishment of reasonable regulations governing the times, places and manner in which interviews with prisoners may take place. And this case presents no question as to the power of prison authorities to prohibit interviews during riots or other institutional emergencies.

What the newsmen in this case do claim is the same right to interview inmates that is enjoyed by relatives, friends, lawyers, clergymen, public officials, and other persons who commonly are permitted to have private conversations in depth with inmates. If all these categories of persons are permitted to interview inmates during normal times and subject to reasonable regulations, there is no justification for excluding the press.

The question presented in this case can be decided very narrowly, without any necessity to lay down even the general outline of the First Amendment right to

gather news. All that the Court need decide is that where a state permits a broad segment of the public to have private interviews with competent persons within its custody subject to reasonable regulations as to time, place and manner, the state may not exclude the press from interviewing such persons who give their consent, subject to the same regulations, except upon a showing of a compelling interest for such exclusion, and that the ordinary circumstances of a prison do not create such a compelling interest.[8]

The gist of the First Amendment claim in this case is the critical need for personal interviews with willing prisoners in order to gather news about prisons effectively, accurately and reliably. That need was recog-

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[8] In *Branzburg*, the Court observed: "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U.S., at 684-85. Although *amici* do not regard that dictum as fully reflecting the applicable law, they emphasize that the press claim in the instant case is fully consistent with it. As the district court in *Washington Post Co.* v. *Kleindienst*, *supra*, 357 F. Supp., at 772, pointed out: "There is, of course, an absolute right of privacy which the press cannot invade. An individual may refuse to be interviewed. Those who wish to consult or meet in private for the day-to-day conduct of public or business affairs may, in furtherance of their own common right to privacy, exclude the media. These commonly accepted situations are, however, obviously quite distinct from the special circumstances presented by this particular controversy. Here the [United States Bureau of Prisons] has not denied the press access to its own personnel. Rather, it has imposed a ban on persons placed in its care by the courts who may wish to talk with the press and are willing to be interviewed."

nized in *Washington Post Co.* v. *Kleindienst,* No. 72-1362 (D.C. Cir. Feb. 21, 1974), where the court held unconstitutional a federal policy imposing a total ban on press-inmate interviews essentially indistinguishable from California's. The federal policy permitted newsmen to visit prisons, to engage in casual conversations about prison problems with inmates randomly encountered on such visits, to interview randomly selected groups of prisoners, and to correspond with individual prisoners; but prohibited face-to-face in-depth private interviews between a newsman and a willing individual inmate designated in advance. The trial court had heard testimony from numerous witnesses (journalists, deans of journalism schools, a sociologist of prisons, and others) concerning the need for personal interviews of inmates for a full understaning of events and conditions in prisons. On the basis of this evidence, the trial court stated:

> "The Court has determined on the basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation. Testimony of Liman and Fisher and the Attica Report itself are particularly persuastive on this key issue." 357 F. Supp., at 781.[9]

[9] "Fisher" is Roy M. Fisher, Dean of the University of Missouri School of Journalism. "Liman" is Arthur L. Liman, General Counsel to the New York State Special Commission on Attica, which conducted the official inquiry into the Attica riots of 1971.

The D.C. Circuit affirmed this holding, *Washington Post Co.* v. *Kleindienst, supra,* at 10-13.

The findings that supported this conclusion included the following:

> "The opportunity for face-to-face interviews with news sources is critical when the credibility and reliability of the source is unknown to the newsman. . . . A private interview with an inmate having a particularized grievance permits the newsman to 'study the demeanor of the man, pursue questions at once, watch reactions, [and] confront him with things that seem to be internally inconsistent. . . . None of these opportunities exists as a practical matter in the alternative sources of information available to newsmen under the current [federal] Policy Statement. . . . The opportunity for a face-to-face interview is as important to a newsman gathering news as it is to an attorney developing his case, . . . or a police detective investigating a crime. . . . Face-to-face interviews with news sources play such a fundamental role in the news-gathering process that the development of interviewing techniques is a central feature of the curricula of the nation's most prestigious journalism schools.
>
> "The plaintiffs placed in evidence a study published by Journalism Quarterly which analyzed the reasons for inaccuracies in news stories. . . . A major conclusion of that study is that 'lack of contact between the newsman and a news source increases the chance that serious subjective errors will be perceived as occurring or will occur.' . . .
>
> "The report of the New York State Special Commission on Attica . . . was based principally on some 3,000 interviews, 1,600 of them with inmates at that penal institution. . . . It was the most comprehensive program of face-to-face interviews ever undertaken by persons other than prison author-

ities at a prison. The General Counsel to the Commission recited to the Court an extensive catalog of significant information obtained through interviews with inmates that could not have been obtained in any other manner. . . . The Commission's experience was that confidential interviews with individual inmates were indispensable for the gathering of reliable information about conditions in prison, prisoners grievances and events in which inmates participate.

"A sociologist with extensive experience in prison administration testified that he could obtain an understanding of a penal institution only if he had the opportunity to conduct face-to-face interviews with inmates and prison officials." Finding 25.[10]

With respect to the alternatives to interviews permitted by the federal prison policy, the court made the following findings based on extensive evidence:

"The essential defect in limiting contact between newsmen and particular inmates with grievances or complaints to an exchange of correspondence . . . is that the newsman has no opportunity to confront those inmates and evaluate the credibility of the information they wish to convey. . . . The need for face-to-face confrontation can be of particular importance in the prison context because the inmate who complains by letter may be unknown to the news media and there would be no independent basis for evaluating his credibility and reliability. . . . Newsman-inmate communication by correspondence has other serious defects. It can cause delays in developing current information about events or prison conditions. More-

[10] The complete findings of fact and conclusions of law as adopted by the district court, see 357 F. Supp., at 784, are reprinted in Petition for a Writ of Certiorari, pp. 46-72, *Saxbe* v. *Washington Post Co.*, No. 73-1265 (1974).

over, an exchange of correspondence does not permit a newsman to pursue a line of questioning in depth or to ask follow-up questions on the basis of a particular response. . . . To the extent that newsmen cannot obtain the views of inmates who are not fully literate, an important source of information is likely to be lost. . . . The loss would not be mitigated by the opportunity for some inmates to write letters on behalf of others. . . .

"The opportunity offered newsmen to tour federal prisons and to engage in casual conversations with inmates encountered during the tour is not an adequate substitute for private, individual, in-depth interviews. Those conversations are limited in terms of their duration, . . . and content, . . .; newsmen cannot identify in their stories the inmates with whom they had conversations, . . .; and the conversations may be overheard by prison officials. . . . In addition, because the newsman cannot designate in advance the inmates with whom he will converse, the opportunity for casual conversations gives him no access to inmates who are known to have particularized complaints or other particularized information. . . .

"The willingness of federal prison officials to provide the news media with information about events and conditions is no substitute for private, individual interviews with inmates. Particularly when a newsman is seeking information relating to inmate complaints about the actions of prison officials or employees, newsmen who testified stated that their experiences made them skeptical that those officials or employees will provide them with objective and balanced information. . . . That this skepticism is warranted is shown, for example, by the fact that public officials deliberately gave false information to the news media concerning how the hostages died during the Attica prison revolt in September 1971.

"Plaintiff [Ben] Bagdikian [a newsman] was given an opportunity at the federal prisons at Lewisburg and Danbury to interview several inmates selected at random from the prison population in a group and out of the hearing of prison officials or employees. . . . The group interview conducted by Mr. Bagdikian at Lewisburg proved 'very unproductive,' . . . because the particular inmates he traveled to Lewisburg to interview were not part of the group and because the inmates who participated admitted they could not speak with candor out of fear that what they said would be reported to prison officials by other inmates and result in reprisals. . . . The evidence before the Court also shows that group interviews in the prison context are unsatisfactory because, when interviewed in groups, inmates tend to make speeches for the benefit of other inmates rather than relate facts. Indeed, the New York State Special Commission on Attica found that inmates interviewed in a group were far more critical of prison authorities than when they were interviewed in private." Finding 24.

Many of the themes reflected in these detailed findings concerning the press interest in having individual private interviews with inmates have been emphasized by this Court in other contexts.

In *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), the Government had refused entry into this country to Mandel, an alien professor who had planned to lecture at various American universities. Mandel and several of his intended listeners challenged the denial of a visa to him under the First Amendment. The Government argued that Mandel's exclusion involved no restraint on the First Amendment rights of citizens to receive information because alternative forms of communica-

tion existed. The Court, per Mr. Justice Blackmun, rejected that contention:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches; and because 'technological developments' such as tapes or telephone hook-ups readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion, and questioning. . . . [We] are loathe to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of appellees in this particular form of access." 408 U.S. at 765.[11]

Prior statements of this Court also support the conclusion that, for purposes of news gathering, letters are no substitute for interviews. However prompt a prison mail service may be, mail is in most cases inherently too slow to permit adequate and timely coverage of fast-breaking news events. This Court has recognized that the interest in publication of news in a *timely* fashion is constitutionally protected. See *New York Times Co.* v. *United States,* 403 U.S. 942 (1971) (granting of certiorari and stay of mandate, and order for greatly expedited hearing in this Court); *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 157 (1967) (opinion of Harlan, J., joined by Clark, Stewart & Fortas, J.J.) (suggested distinction between "hot news" and other news). Moreover, this Court has recognized that prison inmates are not apt to be experienced letter

[11] The Court nevertheless upheld the exclusion on the ground that the Government's plenary power to exclude aliens barred courts from looking behind a decision to exclude or weighing it against First Amendment claims.

writers. "Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson* v. *Avery*, 393 U.S. 483, 487 (1969). See also *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970), where the Court pointed out the inadequacy of relying on written statement by welfare recipients:

> "Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations. . . . Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision."

In sum, California's prohibition of press interviews with prisoners is a direct and severe restriction on the capacity of the press to gather news and inform the public about prisons.

IV. NO COMPELLING GOVERNMENTAL INTEREST SUPPORTS § 415.071'S TOTAL BAN ON ALL PRESS INTERVIEWS WITH PRISONERS DESIGNATED IN ADVANCE.

The principal arguments advanced in support of § 415.071's total ban on all press interviews with prisoners are that such interviews unduly burden prison administration and that they create security problems in prisons. Neither argument withstands analysis. Nor do subsidiary arguments that press interviews will subvert a policy of treating prisoners uniformly, that they will impede rehabilitation, and that prison authorities may prevent newsmen from "trespassing" on "their" property.

A. ADMINISTRATIVE BURDENS

In *Washington Post Co.* v. *Kleindienst,* No. 72-1362 (D.C. Cir. Feb. 21, 1974), the district court had heard testimony from officials of the prison systems in California, Massachusetts, Illinois,[12] Iowa, Florida, New York City, Cook County, Illinois,[12] the District of Columbia, and the federal prison system. Among the witnesses was Director Procunier, appellee in the instant case. On the basis of this extensive record, the district court had made the following finding concerning the administrative burdens created by press interviews with prisoners:

> "The visiting facilities at penal institutions are frequently not used to their full capacity, and thus are available for press interviews with inmates. . . . Other facilities—*e.g.,* conference rooms used for attorneys' visits—are also likely to be available at many institutions. . . . Those jurisdictions which generally permit press interviews with inmates have had a relatively small number of requests for such interviews. . . . In these same jurisdictions, there has been considerable public interest in the prison system . . . . Most large penal institutions facilitate thousands of interviews per year between inmates and their friends, relatives, and counsel. . . . The number of press interviews likely to occur, and the resulting administrative burden, are insignificant in relation to the total number of interviews granted each year. . . . Press interviews with inmates do not create significantly greater administrative burdens than other visits from friends, relatives, and counsel." Finding 48.

The court of appeals affirmed this finding. *Washington Post Co.* v. *Kleindienst, supra,* at 20, n. 20.

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[12] By deposition.

The court below also was not impressed by appellee's allegations of administrative burden. See 364 F. Supp., at 202-03. The court noted testimony that " 'hundreds' of private citizens visit California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel." Against this background it can hardly be contended that the relatively few press interviews likely to occur will unduly burden California penal authorities.

Moreover, whatever undue administrative burdens there *might* be, they can be entirely eliminated, as the court below recognized, *id.*, by reasonable regulation of the frequency and duration of interviews, though of course such regulations may not discriminate against the press in comparison with other persons who visit and talk with inmates. Cf. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Flower* v. *United States*, 407 U.S. 197 (1972).

B. PRISON SECURITY

There is no doubt that California has a compelling interest in the security of its penal institutions. But however important prison security may be—and it is very important—it cannot be invoked to justify every restriction which may in some way protect security. Even national security may not be so relied on. In *United States* v. *Robel*, 389 U.S. 258, 263 (1967), this Court stated, "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not

remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 426 (1934)." The question presented here is not whether prison security is important, but whether, in the light of experience, press interviews pose such a significantly greater danger to prison security than do interviews with relatives, friends, lawyers, etc. that a state may completely prohibit press interviews while continuing to permit interviews with these other persons.

1. Newsmen as Risks to Prison Security

The argument that newsmen themselves jeopardize prison security was firmly rejected by the court below. 364 F.Supp., at 203. It was also rejected in *Houston Chronicle Pub. Co.* v. *Kleindienst*, 364 F.Supp. 719, 729 (S.D. Texas, 1973), where the court commented, "As for the safety of the institution, it is no more threatened by a press interview than it is by a visit from the inmate's family, friends, or lawyer." And it was rejected in *Washington Post Co.* v. *Kleindienst*, 357 F.Supp. 770 (D.D.C. 1972), on remand, 357 F.Supp. 799 (D.D.C. 1972), where the district court found:

> "Security procedures used by prison administrators to prevent the introduction of contraband by friends, relatives, attorneys and other visitors to prisoners are readily applicable to newsmen entering prisons to interview inmates, without any loss of effectiveness. . . . Members of the press are no more likely to introduce contraband than are lawyers, friends, relatives, or other visitors. . . . Members of the press are no more likely to participate in escape plans, to solicit offenses, or to make other unlawful or improper communications with inmates than are lawyers, friends, relatives, or other visitors." Finding 47.

2. The "Big Wheel" Theory

Another argument made in support of § 415.071 is that press interviews enable certain inmates to rise to the status of "big wheels" within a prison and thereby exercise a "negative" influence on other inmates. The court below considered this argument carefully, and rejected it. 364 F.Supp., at 203-04. In the *Washington Post Co.* v. *Kleindienst* litigation, both the district court and the court of appeals found that the "big wheel" phenomenon is an isolated evil, which does not justify a total prohibition of interviews with all inmates, the vast majority of whom are neither actual nor potential big wheels. See 357 F.Supp., at 781; *Washington Post Co.* v. *Kleindienst, supra,* at 14-17. As the district court stated:

> "The 'big wheel' justification did not withstand analysis. While the term is found in *Seale* v. *Manson,* 326 F.Supp. 1375 (D. Conn. 1971), it has no precise meaning. Apparently it refers to prisoners whose militancy, tendency to act out and negative influence within a prison community make it likely that sustained press interviews and attention, involving them may spark disruptive conduct by inmates within the walls. Not all prominent offenders or prison leaders fall in this category. The very few who do are usually, if not always, identifiable in advance. Interviews with such prisoners can be requested specially. The 'big wheel' justification cannot, however, be used to stifle expression by any leader in the prison community who may differ with the warden and certainly it goes too far afield to blanket all federal prisoners under this rhetoric for the obvious purpose of stultifying dissent." 357 F.Supp., at 781.

The "big wheel" theory has no precise meaning. It is not clear whether the big wheels are supposed to be

prisoners who are well known to the general public, prisoners who cause disciplinary problems, or inmate leaders. The three categories are not the same. Well-known inmates such as Nathan Leopold, Richard Speck, Sirhan Sirhan and Clifford Irving have not been trouble-makers or leaders. Conversely, inmates who violate prison rules, get into fights, and cause trouble are generally not well known to the public. Finally, the leaders of inmate social groups tend to be neither well known nor trouble-makers.[13]

The reason for the theory's focus on interviews with designated inmates is also unclear. California certainly cannot prevent the press from writing about newsworthy inmates, including those who lead strikes and riots. Such articles are received by other inmates through the mail. California does not prevent prisoners from writing letters and even, in the case of George Jackson, books. It also permits newsmen to converse with randomly selected inmates. In all these ways, some inmates may attract considerable attention and may achieve influence which can be turned to good or ill. In this context, it is difficult to understand what compelling interest requires a total prohibition of press interviews with inmates designated in advance.

To the extent that there are inmates who have positions of influence within the prison population and who use those positions for anti-social purposes, they are a small percentage of the inmate population. *Washington Post Co.* v. *Kleindienst, supra,* at 16.

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[13] *See, eg.*, Theoretical Studies in Social Organization of the Prison, 10-11, 39-41, 43, 45-46 (1960) (Social Science Research Council, N.Y., N.Y.); H. Mattick, The Prosaic Sources of Prison Violence (1972); Report of the New York State Special Commission on Attica, 104-13 (1972).

They are also generally known to prison officials. The district court in *Washington Post* made specific findings on this point:

> "The Court finds that state and federal prison officials are able in most cases, and with no more than ordinary human error, to identify actual and potential big wheels and trouble-makers within their institutions. . . . Within the first few weeks of commitment to federal prison, all inmates within the jurisdiction of the Federal Bureau of Prisons receive a thorough evaluation, including intensive diagnostic studies . . . The results of this evaluation are available to prison administrators and are the basis for many significant decisions made with respect to the handling of inmates. In general, and with no more than ordinary human error, prison administrators and their staffs know who are the actual and potential trouble-makers within their institutions at any given time. . . . Information similar to that available to federal prison officials is the basis for the operation of Illinois' policy, which generally favors press interviews with individual inmates, but vests significant discretion in prison administrators. This policy has proved to be feasible in Illinois, and has worked satisfactorily." Findings 55, 56.

Against this background, whatever merit the "big wheel" theory may have, it cannot support a policy denying interviews with the vast majority of inmates who cannot possibly become big wheels. If in some particular cases press interviews will create a big wheel phenomenon, with consequent dangers to prison security, interviews in those cases may be denied under a regulation narrowly and precisely drawn to deal with that specific problem. See *Washington Post Co.* v. *Kleindienst, supra,* at 22-24.

C. UNIFORMITY

The claim that § 415.071 is justified as part of a policy of treating all prisoners alike is untenable. Neither California nor any other prison system seeks to treat all prisoners alike or to give them all equal privileges. The finding of the district court in *Washington Post Co.* v. *Kleindienst, supra,* with respect to the federal prison system applies with equal force to California's large and diverse system of approximately equal size:

> "The Court finds that the defendants have not shown that from a correctional point of view the Federal Bureau of Prisons has any substantial interest in having an absolutely uniform policy with respect to press interviews with inmates applicable at all institutions and to all inmates under its jurisdiction. . . . The policy of the Federal Bureau of Prisons is not to make all its institutions uniform, to have them all uniformly administered, or to treat all inmates as if they had the same correctional needs. Quite the contrary, the policy of the Federal Bureau of Prisons is to establish and maintain various types of institutions, having different correctional policies and serving different correctional needs, so that different inmates are subjected to different institutional experiences in federal correctional institutions. . . . Even among institutions where uniformity may be sought as a matter of policy, in a large number of respects it is not, and cannot be, achieved. Every prison reflects the background, personality, style and training of its chief administrator; the personal qualities of its staff; the region in which it is located; and the daily life of its inmates is affected by its particular physical plant and other resources. As these differ from one institution to another, the inmates at those institutions will inevitably experience significant differences in

their rights, privileges and opportunities. In view of these differences, any differences in the administration of a policy vesting some discretion in prison administrators over the holding of press interviews are of trivial or very minor significance." Finding 54.

Moreover, correctional officials make numerous decisions every day that result in different life experiences and status for inmates under their control. They give some inmates high status jobs within the prison; they allow some inmates to participate in special programs; they make a host of other discretionary decisions that have a material impact on the particular inmates affected.

In addition, the fact that the press would seek to interview some inmates and not others certainly would not constitute a violation of California's duty to afford equal protection to inmates. Some inmates will inevitably receive more visits from relatives and lawyers, or more letters, or more packages than do others.

Finally, that there is no validity in the argument that press interviews should be prohibited in the interest of uniformity is demonstrated by the testimony of appellee Procunier in *Washington Post Co.* v. *Kleindienst, supra.*[14] Mr. Procunier testified that California had at one time freely permitted press interviews, but that after the death of George Jackson the policy had been changed to the one reflected in § 415.071. However, despite the experience with Jackson, Mr. Procunier testified that *on penological grounds* he still prefers a

[14] The text of Mr. Procunier's entire testimony, which was introduced by appellee in the instant case, appears at pp. 277-304 of the Joint Appendix in the instant case.

flexible approach to the granting of interviews, rather than a total prohibition:

> "The best way for prisons to run, in my opinion, is to allow the warden or the man in charge of each institution, who can better assess than any director or anyone else the conditions of his institution and the kinds of inmates or the condition of the inmate at the time, the type of person that wants to interview him, for what purpose, to make a subjective evaluation of the total thing."

Mr. Procunier testified that he adopted his present policy only because "[m]y attorney suggested to me . . . that I had to make it [the prohibition] apply to everyone or I would not be allowed the prerogative [of prohibiting interviews in some circumstances]. *That is the only reason I have it across the board.*" (emphasis supplied). The district court found:

> "California . . . long had rules permitting interviews but terminated them after a recent outbreak at one prison attributed in part to many inflammatory interviews permitted a single prisoner. However, its knowledgeable, experienced Director, were it not for questionable legal advice, would still permit intervews in many sectors of his statewide correctional system." 357 F.Supp., at 774.

D. REHABILITATION

Director Procunier argued below that press interviews will interfere with prisoner rehabilitation. The court found that "little more than vague speculation" was offered to support the argument. 364 F.Supp., at 203. Moreover, the weight of correctional thinking is that increasing contacts between prisoners and the general public, including members of the press, promotes rather than retards rehabilitation. See, *e.g.*,

Report of New York State Special Commission on Attica, pp. xvi-xvii (1972).

E. PROPERTY LAW CONCEPTS

It has been argued that because prisons' physical plants are not freely open to the public, therefore they are analogous to private property, from which the press may be excluded. The short answer to this contention is that a newsman seeking to interview a particular prisoner has no particular desire to be on prison property. If interviews with inmates could be conducted elsewhere, the press would have no objection. But as the district court in *Washington Post Co.* v. *Kleindienst, supra,* pointed out, "The sources of news are solely in the prisons. No alternative satisfactory sources are available and the press claims its proper right of access." 357 F.Supp., at 783.

Moreover, prison property is public, not private, property. And it is public property that customarily is open to large segments of the public:

> "Prisons are not walled off sanctuaries like the Pentagon Map Room or the Justices' Conference table at the Supreme Court. Prisons are villages in themselves. Families, lawyers, congressmen, clergymen and friends visit in public interview, space provided. Newspapers, magazines, radio and television programs pour in incessantly throughout the day. Within the prison walls there is illness, drug distribution, prostitution and many other matters of everyday occurrence on the outside. Crimes are committed and punishments imposed during incarceration. Inmates are of varying ages, political persuasions and background. Some prisoners come and go on furlough or compassionate leave. Mail is substantially uncensored. Local communities are encouraged to

> participate in the affairs of these institutions by rendering neighborly family counseling and support. Indeed, half-way houses, vocational and educational programs, and other community ventures include prisoners serving time . . . . It is wholly inconsistent with an open democratic society to allow the state to seal off from press scrutiny thousands of men and women who have been charged with or found to have committed criminal offenses." 357 F. Supp., at 782-83.

Where a newsman seeks entry merely to talk peacefully in a private one-to-one interview with another willing person, and not to demonstrate or disrupt,[15] his right to do so should not turn on arid concepts of property law. Property concepts are particularly inapplicable in the case of interviewees held on particular property against their will. But if property concepts are relevant, newsmen entering for the purpose of interviews, are no more "trespassers" than are relatives, friends, lawyers, clergymen and others entering for the same purpose.[16] In any event, when weighing property rights against the exercise of First Amendment rights, one must "remain mindful of the fact that the latter occupy a preferred position." *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946), a "company town" case, but expressly followed in the companion case of *Tucker* v. *Texas*, 326 U.S. 517 (1946), involving federally owned real property. *See also,*

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[15] Contrast *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

[16] Thus, here as in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), the purpose of the entry onto the property in question is directly related to the normal use of the property.

e.g., Flower v. *United States,* 407 U.S. 197 (1972); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972).

F. PRACTICE IN OTHER AMERICAN JURISDICTIONS

The insubstantiality of all of appellee's arguments for § 415.071 is shown by the fact that the vast majority of American jurisdictions successfully permit precisely the kind of interviews which are sought here, and which California prohibits.

In *Washington Post Co.* v. *Kleindienst, supra,* the district court received evidence concerning the then current policies in 24 state and local jurisdictions.[17] Of these, only five, together with the United States Bureau of Prisons totally prohibit press interviews with inmates (California, Connecticut, Kentucky, Virginia and Wisconsin). Eleven generally permit press interviews, while retaining discretion to deny them when special circumstances warrant (Illinois, Maine, Maryland, Nebraska, North Carolina, Ohio, Vermont, Iowa, Massachusetts, District of Columbia, New York City). Seven jurisdictions have policies that neither generally permit nor generally deny such interviews, but vest in correctional administrators discretion to permit or deny them in individual cases (Alaska, Georgia, Montana, New Jersey, Oregon, Pennsylvania, South Carolina). New Mexico has a unique policy that

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[17] Counsel for the Washington Post Co. wrote to every state and numerous local jurisdictions requesting a copy of their policy on press interviews with inmates. All the statements of policy received were offered into evidence. The court received into evidence only those statements of policy which had previously been established in written form. Although Massachusetts had no written policy, the court heard live testimony from its Commissioner of Corrections.

does not fit into any of these categories. *See Id.*, Finding 52.

The Association of State Correctional Administrators has promulgated a guideline on relations between news media and prisons which provides for discretion in prison administrators to grant or deny interviews on an individual basis. It thus rejects the kind of total ban imposed by § 415.071. Of course, since the guideline reflects the views of prison administrators, it does not necessarily reflect an impartial or expert weighing of First Amendment interests. But it does make clear that from a correctional point of view, there is no reason to exclude the press entirely from interviews with inmates, as California does.

The National Council on Crime and Delinquency has promulgated a Model Act for the Protection of Rights of Prisoners, § 7 of which provides, *inter alia*, that "[a]ny . . . citizen may make application to visit an institution and talk in private with prisoners if the applicant establishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive of the program of the institution." Section 7 further provides:

> "If the application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established

by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution."

This provision plainly contemplates that newsmen shall have opportunities to interview inmates privately, subject to discretion in prison administrators to prohibit interviews where necessary in the interests of protecting the functioning of the institution. The NCCD and the committee which drafted the model act plainly have concluded that the exercise of such discretion by prison administrators is feasible and consistent with correctional goals.

The fact that 18 American jurisdictions have policies which permit press interviews while giving greater or lesser scope for the exercise of discretion by prison administrators, and the fact that two organizations expert in correctional matters have proposed this type of policy rather than a total prohibition of press interviews, show that a very broad spectrum of opinion of professional correctional administrators in all parts of the United States believe that such a policy is feasible and consistent with correctional goals.[18]

G. CONCLUSION ON ASSERTED JUSTIFICATIONS FOR § 415.071

Under the pattern of analysis adopted by this Court in numerous First Amendment cases, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Talley* v. *California*, 362 U.S. 60 (1960); *Speiser* v. *Randall*, 357 U.S. 513, 528-29 (1958); *Martin* v. *Struthers*, 319 U.S. 141 (1943), a

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[18] The foregoing discussion is based on *Washington Post Co.* v. *Kleindienst*, *supra*, Findings 57-59.

state restricting the exercise of First Amendment rights has the burden of showing that a compelling government interest makes the restriction necessary, and that the restriction is no broader than the compelling interest requires.

California has failed to sustain that burden here. It has not offered any solid reason which in logic or experience supports § 415.071's total and direct prohibition of press-inmate interviews. The arguments advanced by California have been rejected by the overwhelming majority of correctional departments throughout the country. If they can permit press interviews without disaster, so can California. In holding that California has not met its burden, this Court would not be substituting its judgment for California's. Rather, it would be concluding that, in view of correctional experience generally, the considerations marshalled by California do not rise to the level required by the First Amendment. And it would be recognizing that California's legitimate interests can be fully protected within the framework of a rule generally permitting press interviews. See pp. 45-36, *infra*. As United States Parole Board Chairman, Maurice H. Sigler, stated to a group of correctional officials: "So far, we have been able to live with the rulings of the courts. They haven't brought about the disastrous consequences some of us have predicted. Instead, the effect of the courts' new interest in corrections has been beneficial." Maurice H. Sigler, "A New Partnership in Corrections", address before the 102d Congress of the American Correctional Association (Aug. 21, 1972).

V. A PRISONERS' RIGHT TO BE INTERVIEWED IS NO SUBSTITUTE FOR A PRESS RIGHT TO INTERVIEW.

Although the court below held that newsmen have no First Amendment right to interview prisoners, it also held that prisoners do have a First Amendment right to be interviewed by newsmen. This distinction turned entirely on the district court's reading of *Branzburg* v. *Hayes,* 408 U.S. 665 (1972),[19] and not at all on any weighing of the respective public, press, and correctional interests. Although the district court was correct in recognizing a prisoner's right to be interviewed by a willing newsman, we submit that a prisoner's right to be interviewed is no substitute for a newsman's right to interview, even though the newsman's right applies only as to inmates willing to be interviewed.

If the only right to an interview is the prisoner's, he bears the full burden of initially asserting it, and of pressing it to final decision through the various layers of the correctional bureaucracy. Prison authorities have total control over prisoners' lives, and prisoners know it. Many inmates who may be willing to be interviewed may be unwilling or unable to take the initiative in requesting an interview or to appeal from one level of the official hierarchy to another.

The press is far more able to bear this burden. It is independent of prison authorities. It is in a better position to present reasons why in the public interest, and perhaps in the interest of the institution, the interview should be held. It has easier access to counsel to assist in asserting the right.

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[19] That the district court's interpretation of *Branzburg* is erroneous was shown at pp. 14-17, *supra.*

Moreover, the press has the unique expertise, and is uniquely assigned the constitutional function, of determining what matters are newsworthy and what interviews are needed in order to inform the public. Prisoners are not likely to be able to make those judgments with objectivity or expertise.

Of course, a newsman desiring to interview a particular inmate could write to him suggesting that he request an interview. But this circuitous process introduces the delay and other problems accompanying any correspondence by mail with inmates, see pp. 23-24, 26-27, *supra,* which may be fatal to a news story. The risks of delay are compounded where, as is often the case, a newsman wishes to interview several inmates having knowledge about a particular matter. In that situation he would have to write to each of them, and rely on the ability of each to initiate and press forward a separate request to be interviewed by the reporter. To the extent that the separate requests are processed at different rates, the newsman will encounter delay and perhaps the substantial burden of having to travel several times to one of the out-of-the-way places where prisons tend to be located. By contrast, recognition of a newsman's right would permit a reporter to follow up his own requests to make sure that they were being processed with the greatest possible dispatch, and that they would not be separated in the order of priority.

Finally, as a matter of doctrine, the constitutional claims of one group should not be denied on the ground that the parallel claims of another group are being recognized. In particular, the First Amendment right of the public to be informed about prisons and the First Amendment right of the press to gather news

about prisons are independent of any rights of prisoners to be interviewed. If prisoners themselves were held to have *no* First Amendment rights, the public and press interests in information concerning them would remain, and the consequent First Amendment claims of public and press would be undiminished. Similarly, that inmates have a right to be interviewed by willing interviewers does not lessen the justification for recognizing the corresponding but independent rights of the public and the press, resting as they do on different foundations in First Amendment law.

VI. PRESS INTERVIEWS WITH INMATES SHOULD BE PERMITTED EXCEPT WHERE SERIOUS ADMINISTRATIVE OR DISCIPLINARY PROBLEMS WILL DIRECTLY AND IMMEDIATELY RESULT.

In addition to reversing the judgment below with respect to appellants, this Court should hold that under the First Amendment, and subject to reasonable regulations as to time, place, and manner, newsmen shall be permitted to have private, uncensored, face-to-face interviews with individual prison inmates designated in advance by the newsmen, except where prison authorities reasonably determine, on the basis of conditions at the institution or the inmate's past behavior, that a particular requested interview would directly present a serious risk of immediate administrative or disciplinary problems in the prison. *Cf. Washington Post Co.* v. *Kleindienst,* No. 72-1362, pp. 22-24 (D.C. Cir. Feb. 21, 1974).

This rule has several virtues. First, it provides for decisions on interviews on a case-by-case basis, rather than by broad absolute fiats. *Cf. Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972) ("[P]redic-

tions about imminent disruption from picketing involve judgments appropriately made on an individual basis, not by means of broad classifications."); *Branzburg* v. *Hayes,* 408 U.S. 665, 710 (1972) (Powell J., concurring). Second, it allows a prison official to make the initial decision on a request for an interview, and does not substitute the judgment of any outside person. Third, it provides a standard for decision, analogous to the "clear and present danger" doctrine, which guides the administrator: it calls upon him to determine whether conditions in his institution are so extraordinary, or the past record of the inmate sought to be interviewed is such, that the interview presents a serious risk of administrative or disciplinary problems. Fourth, this standard does not require an administrator to make a hairline judgment or to offer proof to mathematical certainty. Rather, it requires him to make a good faith judgment of probability, based on his own experience and knowledge, and either the objective conditions at his institution or the past record of the particular inmate involved. If an administrator cannot apply this test, he has no business running a prison. If, under this test, he cannot make the requisite showing, he has no good reason to deny a requested interview.

Finally, the proposed standard properly reflects the weight of First Amendment values. It establishes a presumption in favor of interviews, which is rebutted upon a showing of special need to deny a particular interview. The permissible basis for a denial is narrowly and precisely delineated so as to authorize the least restriction upon First Amendment interests while fully protecting compelling governmental interests. See cases cited at pp. 39-40, *supra.*

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment below as to appellants herein should be reversed, and the case should be remanded with directions that appellees promulgate in place of § 415.071 a new regulation providing that an interview between a newsman and a prisoner designated in advance may be denied only when it presents a serious danger of administrative or disciplinary problems because of the past behavior of the particular inmate or because of conditions existing at the prison in question.

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APPENDIX

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February 25, 1974

Richard M. Cooper, Esq.
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Washington, D. C.

RE: *Pell* v. *Procunier*
73-918

Dear Mr. Cooper:

Pursuant to your request, this is to inform you that plaintiff-appellants hereby consent to the filing of an *amicus curiae* brief on behalf of the Washington Post Company, the Miami Herald, and other newspapers.

Yours truly,

/s/ HERMAN SCHWARTZ
Herman Schwartz
Attorney for Plaintiff-Appellants

HS/jl

STATE OF CALIFORNIA
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STATE BUILDING, SAN FRANCISCO 94102

February 20, 1974

Richard M. Cooper, Esq.
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Dear Mr. Cooper:

Re: Pell v. Procunier
USSC No. 73-918

In response to your letter dated February 14, 1974, this office, as counsel for appellees in the above entitled case, states that it would not object to the filing of an amicus curiae brief in the above entitled case on behalf of the Washington Post Company, the Miami Herald, and other newspapers.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

/s/ JOHN T. MURPHY
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Certificate of Service

I hereby certify that three printed copies of the foregoing Brief of The Washington Post Company, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., The Minneapolis Star and Tribune Company, New York News, Inc., and The Times Mirror Company, *Amici Curiae,* in Support of Reversal, were mailed, first-class air mail, postage prepaid, this 7th day of March, 1974, to each of the following:

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/s/ RICHARD M. COOPER
Richard M. Cooper

MAR 21 1974

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-754
Consolidated with
No. 73-918

RAYMOND K. PROCUNIER, ET AL.,
Appellants,
vs.
BOOKER T. HILLERY, JR., ET AL.,
Appellees.

EVE PELL, ET AL.,
Appellants,
vs.
RAYMOND K. PROCUNIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

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IN THE

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OCTOBER TERM, 1973.

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RAYMOND K. PROCUNIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE FOR CHICAGO TRIBUNE COMPANY

May It Please the Court:

This amicus brief is submitted on behalf of the Chicago Tribune Company in support of the proponents of access to prison information. Consent to the filing of this brief has been obtained from both the appellants and appellees pursuant to Rule 42(1).

STATEMENT OF INTEREST

Amicus Chicago Tribune Company is the publisher of the *Chicago Tribune*, one of the nation's largest daily and Sunday newspapers; the *Chicago Tribune* has a well-established tradition of appearing before this Court in litigation concerning the public's right to be informed through a free, unfettered press. See *e.g., Miami Herald Publishing Co. v. Tornillo*, No. 73-797 (now here on appeal from the Florida Supreme Court); *Associated Press v. Walker*, 388 U. S. 130 (1966); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Near v. Minnesota*, 283 U. S. 697 (1930).

The claim has been made and convincingly documented that penal conditions in the United States have become "essentially invisible." See *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice*, 159 (1967). The *Chicago Tribune* believes that the press and the public are entitled to reasonable access to information relating to prisons, prisoners, and the problems of both; the First Amendment requires no less if freedom of the press is to remain robust.

We accordingly submit this amicus brief in support of the proponents of access to prisoners and prison information.

ARGUMENT

I. Prison Conditions and the Treatment of Inmates Are the Public's Business.

The 1974 philosophy of prisons, punishment and penology centrally emphasizes humane treatment of prisoners and their rehabilitation; today's viewpoint is in marked contrast to early attitudes toward prisoners and penology.[1] Nevertheless and despite this enlightened attitude, there appears to be a growing

1. Originally, dungeons and prisons, such as the Tower of London, were used for the incarceration of royalty and the rich; poor offenders were simply publicly punished, tortured or executed.

inability to solve the problems of prison administration and control, the environment in prisons, and the reformation and return to society of those incarcerated.

Every informed citizen and newspaper editor is aware of such tragic incidents as:

—The Attica Riot, September 9-13, 1971. 43 New York citizens died; 80 others were wounded in the retaking of the prison.

—The Rahway, New Jersey, State Prison Riot, November 24, 1971. Six guards were injured; the warden was taken as a hostage.

—The Walpole, Massachusetts, State Prison Riot, March 17-19, 1972. Five inmates and two guards were injured.

—The Patuxent State Prison Riot, Jessup, Maryland, May 22, 1972. Seven guards were injured.

—The Menard State Prison Riot, Joliet, Illinois, January 11, 1973. During the week-long disturbance, one guard was attacked and killed.

—The Oklahoma State Prison Riot, McAlester, Oklahoma, July 28-August 1, 1973. At least four prisoners were killed.

Mitford, *Kind and Usual Punishment,* 30-31 (1973). Thus, places for long confinement of criminals were unnecessary. The type of penal institution existing in this country today was an American innovation of the early 19th Century, designed and intended to abolish the barbarities of corporal punishment. See *Attica: The Official Report of the New York State Special Commission* 6-7 (1972). Nevertheless, the public attitude toward prisoners was markedly different one hundred years ago than it is today. In 1871, a prisoner was considered "a slave of the State" with no enforceable constitutional rights, *Ruffin v. Commonwealth,* 62 Va. (21 Gratt.) 790, 796 (1871). By 1972, the public's attitude had moved so far from this view that one court was prompted to say:

> "I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the U. S. as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." *Morales v. Schmidt,* 340 F. Supp. 544 (W. D. Wis. 1972).

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Each of these tragic incidents received vast coverage in the news media; the Court, we think, can take judicial notice of this extensive press coverage and the nationwide interest in the incidents. *See, e.g., Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3d Cir. 1971), *cert. denied* 404 U. S. 883 (1971); *Fox v. City of West Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967). All of these unfortunate episodes resulted in charges and countercharges concerning the causes of the riot, the means by which it was quelled, the steps necessary to prevent a recurrence, and the disciplinary action taken against those inmates allegedly involved in causing or participating in the riot. In many cases, the incidents were of such intense interest and public concern that they prompted official investigations and voluminous published reports. See *Attica: The Official Report of the New York State Special Commission* (1972). Moreover, in addition to the intense public interest in prison riots and uprisings, there has been widespread discussion and debate concerning the entire subject of modern penology. The libraries of the nation abound with such material. See, *e.g.*, Mitford, *Kind and Usual Punishment* (1973); American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (1971); Rothman, *Discovery of the Asylum* (1971); Melville, *Letters from Attica* (1972); Menninger, *The Crime of Punishment* (1969); Zimmerman, *Punishment Without Crime* (1964).

In sum, we believe that all parties to this litigation will freely admit that penal institutions, their inmates, and the attendant problems are matters of acute public and social interest. Thus, and beyond peradventure, correctional institutions and their operation present a compelling example of the kind of subject that is most appropriate for the debate and dialogue that have long been encouraged and protected by the First Amendment as construed and applied by this Court. *E.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412

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U. S. 94, 112 (1973); *Rosenbloom v. Metromedia*, 403 U. S. 29, 43-44 (1971); *Watts v. United States*, 394 U. S. 705, 708 (1969); *Lamont v. Postmaster General*, 381 U. S. 301, 307 (1965); *Linn v. Plant Guard Workers*, 383 U. S. 53, 62 (1966); *New York Times v. Sullivan*, 376 U. S. 254, 270 (1964). *See also Terminiello v. Chicago*, 337 U. S. 1, 4 (1949).

II. Press Access vs. Maintenance of Institutional Order.

Clearly, one of the most appropriate and traditional means of informing the public of prison conditions, problems and proposed improvements is the news media. *See, e.g., New York Times Co. v. United States*, 403 U. S. 713, 717 (1971) (Black, J., concurring); *Mills v. Alabama*, 384 U. S. 214, 219 (1966). Equally plain is the fact that the news media cannot so inform the public without reasonable access to accurate and timely information obtained through objective investigative reporting. Indeed, however, well intentioned and dedicated persons responsible for administration and control of the penal system may, for motives they believe laudable, conceal or distort embarrassing or depressing conditions; if such administrators are inefficient or corrupt they will *a fortiori* conceal the truth.

On the other hand, we also recognize and freely concede that no penal institution, regardless of how modern or enlightened, can function without discipline, order and security. It is thus readily apparent that unlimited access to penal institutions by the press or any interested segment of society could at best be unworkable and at worst dangerous to security. But, especially in the area of "preferred" First Amendment rights, *United States v. C. I. O.*, 335 U. S. 106, 141 (1947) (Rutledge, J., concurring), this Court has traditionally balanced conflicting rights and considerations in such fashion as to give vitality to all interests without sacrificing one at the expense of another. *See, e.g., Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Konigsberg v. State Bar of California*, 366 U. S. 36, 50-51 (1961); *Watkins v. United States*, 354 U. S. 178, 197-98 (1957).

We think a rational compromise of the competing interests herein could be effected by the Court's declaration of the following First Amendment guidelines concerning access to prisoners and penal institutions:

The press should be given access to penal institutions:

a) When a prisoner, within the bounds of reason and common sense,[2] requests an interview by the press, the interview should be allowed; and

b) When a newsworthy happening, *i.e.*, an event of public interest,[3] occurs involving a correctional institution (within the limits of safety).

We respectfully submit that the above constitutional guidelines would accommodate the need to allow the press to obtain information about the operation of an important governmental operation and an ever increasing social problem, and at the same time permit the orderly operation of penal institutions.

---

2. A prisoner's request to be interviewed daily would be beyond the bounds of reason and common sense. The lower courts should have no difficulty developing an appropriate yardstick once this Court has spoken in developing a standard of reasonableness, if needed.

3. The term "newsworthy event" has a well-established meaning in law. See, *e.g.*, *Briscoe v. Reader's Digest Association*, 4 Cal. 3d 529, 541, 483 P. 2d 34, 43 (1971); *Time v. Hill*, 385 U. S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 484 F. 2d 150 (6th Cir. 1973); *Goldman v. Time, Inc.*, 336 F. Supp. 133 (N. D. Cal. 1971).

Some examples of newsworthy events in relation to penal institutions are legislative investigations, reports of the prestigious John Howard Association, a riot, unexplained inmate deaths.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should direct the courts below to dispose of this cause in accordance with the principles set forth in this brief.

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1974

APR 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,

Appellants,

v.

BOOKER T. HILLERY, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,

Appellants,

v.

BOOKER T. HILLERY, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right . . . to petition the Government for a redress of grievances."

QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, ban all press interviews with designated willing prisoners, at all penal institutions, and under all circumstances, while numerous other members of the public are allowed to visit prisoners, absent a showing that such a total ban is reasonably and necessarily related to the advancement of a compelling or substantial governmental interest?

STATEMENT OF THE CASE

Appellees are California prisoners who sought to be interviewed by members of the media. Their requests were denied by virtue of California Department of Corrections Manual Section 415.071, which provided: "Press and other media interviews with specific individual inmates will not be permited."[1]

Initially, the single district judge concluded, on September 29, 1972, that §415.071 violated the First

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[1] Defendants-appellants acknowledged that the denial of media interviews as to all plaintiffs except Hillery was based upon the challenged regulation, §415.071 (A.34, 36, 38, 44, 111). As to Hillery, they claimed: "Such a visit was not considered a media interview, but a special purpose visit, for which no showing of need was made." (A.111, 119). Compare the contemporaneous justification offered by defendant Park to Earth Magazine editors on October 5, 1971: "you are not a friend of prior acquaintance." (A.31, 32). However, the Amended Complaint alleged, without contradiction by defendants, that Earth Magazine editors requested permission to visit Hillery, not only to discuss possible publication of his writings, but also "for the purpose of gaining information for their own articles concerning prisons." (A.26). Thus, in this latter respect, a "media interview" had clearly actually been sought for Hillery, too.

Amendment, and he enjoined its enforcement (A.2). After the state indicated that a three-judge district court was required (A.84), the September 29, 1972 order was vacated, and a temporary restraining order pursuant to 28 U.S.C. §2284(3) was granted, on November 1, 1972 (A. 3).

On November 9, 1972, defendants-appellants promulgated interim regulations, Administrative Bulletin No. 72/40, permitting news media interviews with designated willing prisoners, under limited circumstances (A. 104).

Subsequently, a three-judge district court was convened to determine the constitutionality of §415.071 as originally worded. On August 16, 1973, a majority of that court found that the statewide regulation banning all press interviews with designated willing prisoners, at all penal institutions, and under all circumstances, was not shown to be "reasonably and necessarily" related to the advancement of a "compelling" governmental interest, observing:

> "[W]hile prison discipline, inmate safety, and rehabilitation are indisputably 'compelling state interests' . . . , regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights."[2]

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[2]The majority opinion was written and signed by District Judge Williams. By Memorandum letter, District Judge East concurred. (See Appendix "B" attached to our motion to affirm herein.) The late Circuit Judge Hamlin wrote a separate opinion, concurring on the ground that "even under to (sic) broader 'rational basis' analysis, the blanket prohibition of inmate interviews with the media must fall. As the majority notes there is insufficient evidence in the record to substantiate such a complete ban." 364 F. Supp., at 205.

The court therefore, declared §415.071 unconstitutional, and ordered the defendants-appellants to "present to the court proposed regulations comporting to [its] decision" within 30 days, and to "permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision." *Hillery v. Procunier*, 364 F. Supp. 196, 202, 205 (N.D. Cal. 1973).[3]

SUMMARY OF ARGUMENT

Persons in prison, like other individuals, have the right to petition the government for redress of grievances. In order to effectively communicate their grievances through the channel of public opinion, which in turn may reach public officials, prisoners need to have meaningful contact with the press. Face-to-face interviews are essential because alternative methods of communicating are inadequate.

Prison officials are required to demonstrate, by facts, that their blanket prohibition upon individual press interviews is reasonably and necessarily related to some valid penal interest. No such showing was made here. In fact, the California Director of Corrections has admitted his correctional preference for a more flexible regulation, but his attorney advised him that an across-the-board policy was legally required.

The State has available to it less restrictive means than the challenged overbroad regulation for serving its legiti-

[3] Defendants-appellants neither sought nor obtained any stay of the district court's August 16, 1973 order. Some of the requested interviews have already taken place. And, defendants-appellants have submitted to the court below their proposed new regulations. Final approval of regulations has not yet occurred, as hearings on the propriety of the proposed regulations are still being held.

mate correctional interests. It may impose reasonable restrictions as to the time, place and manner of press interviews. Acting in good faith, and in particularized circumstances, prison officials may impose limitations on visits by the media, which are actually necessary to maintain security, discipline and good order.

ARGUMENT

I.

THE CALIFORNIA PRISON BAN UPON ALL PRESS INTERVIEWS WITH DESIGNATED WILLING PRISONERS HAS NOT BEEN SHOWN TO BE REASONABLY AND NECESSARILY RELATED TO THE ADVANCEMENT OF A COMPELLING OR SUBSTANTIAL GOVERNMENTAL INTEREST, AS REQUIRED BY THE FIRST AND FOURTEENTH AMENDMENTS.

Two years ago, this Court said:

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.' "

Cruz v. Beto, 405 U.S. 319, 321 (1972).

Recognizing that effective protection of the right of access to courts requires the invalidation of even indirect restraints, this Court has guaranteed prisoners the unfettered opportunity to petition judicial authorities, *Ex Parte Hull*, 312 U.S. 546, 549 (1941), the availability of a

transcript or recordation of prior habeas corpus hearings, *Long v. District Court of Iowa*, 385 U.S. 192 (1966), the availability of legal assistance, *Johnson v. Avery*, 393 U.S. 483, 488 (1969), an adequate law library, *Younger v. Gilmore*, 404 U.S. 15 (1971), and relaxation of the standards to be applied to prisoner-prepared complaints, *Haines v. Kerner*, 404 U.S. 519 (1972).[4]

While courts continue to be available to enforce the constitutional and statutory rights of prisoners, it does not follow that the judiciary can or should be the primary forum for resolution of the myriad grievances asserted by prisoners against the criminal justice system in general, or prison officials in particular. The right to petition the government for redress of grievances includes, not only effective access to the courts, but also, and perhaps more importantly, effective access to the other branches of government, legislative and executive. See generally, Comment, *A Prisoner-Press Interview Right*, 11 Am. Crim. L. Rev. 273, 283-86 (1972).[5]

It is here that the crucial role played by the press–in bringing to the public's attention information concerning prison conditions–becomes relevant:

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[4] It has been suggested that *Haines, supra* "may well prove to be the American prisoner's *Marbury v. Madison.*" Kutak and Klippert, *Prisons on the Endangered List*, 11 Am. Crim. L. Rev. 165, 169 (1972).

> "Much as *Marbury v. Madison* opened the way to judicial review of legislation, it is felt that *Haines* enunciates a new policy of the Supreme Court permitting federal courts to review prison administration policy. The liberal standard established by the Court for hearing *pro se* complaints indicates its desire to allow inmates the opportunity to challenge prison procedures." *Id.*, n. 14.

[5] Kutak and Klippert, *supra* n. 4, mention "the need to protect and expand the sources of information which do influence the Congress in terms of bills introduced and hearings scheduled." 11 Am. Crim. L. Rev., at 174-75.

"Where no provision is made for meaningful contact with the press, prisoners are denied their only opportunity to effectively communicate their grievances through the channel of public opinion. Without interview access to the press—use of the press to reach public officials through the public—the prisoners' right to petition the legislative and executive branches of Government remains illusory."

Comment, *supra*, at 287.[6]

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[6]In remarks prepared for the National Conference on Corrections, at Williamsburg, Virginia, on December 7, 1971, the Chief Justice stated:

"Two and one-half years ago, in discussing corrections problems at the ABA meeting in Dallas, Texas, I urged that lawyers and judges – and indeed citizens generally – visit prisons and form their own judgments. The Young Lawyers' Section of the ABA took on the burden of promoting a Prison Visitation Program. [See, 9 Cr. L. Rptr. 2120 (1971).] . . . Few things would help more than having the public fully informed on the problems of prisons and the burdens of those who administer them . . . What is desperately needed is that [administrators] have the resources and the authority that only public support and legislative action can provide. The people of this country can bring that about if they will see firsthand how their institutions are being run and what support they receive."

Interestingly, one of the defendants in this case has written:

"A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the President of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs.

Park, *On Being Medium Nice to Prisoners*, [1973] Wash. U. L. Q., 607, 615.

The remote location of some prisons may make it extremely difficult for many citizens to visit them, a problem less substantial for a reporter on assignment.

As a "community ombudsman," the media can report, not only the incidence of crime, but the effectiveness of the system designed to control it. See, Vanden Heuvel, *The Press and The Prisons*, Columbia Journalism Review, p. 35 (May/June 1972).

Closely related to the prisoner's First Amendment right to petition the government for redress of grievances, is his equally compelling First Amendment freedom of speech, as well as the freedom of the press.[7]

A. The Applicable Legal Standard.

Decisions of this Court in First Amendment cases have required–

> "that official action with adverse impact on First Amendment rights be justified by a public interest that is 'compelling' or 'paramount,' . . . justifiable government goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press or association."
>
> *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972).
>
> "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."
>
> *N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).*

The overwhelming majority of lower federal courts have applied this two-step analysis to cases involving prisoners' First Amendment rights. In order to limit such freedoms, state prison officials have the burden of showing: 1) that

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[7] Freedom of speech and of the press and the rights of assembly and petition, "though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

the challenged regulation is required by a compelling state interest, and 2) that the method chosen to limit the right is the least restrictive means of serving that interest. See, *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971); *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971); *Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir. 1972); *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).[8]

Keeping in mind that First Amendment principles are applied "in light of the special characteristics of the . . . environment," *Healy v. James*, 408 U.S. 169, 180

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[8] Appellants assert that "A reasonableness standard has been invoked by some courts to evaluate regulations which impair the practice of religion" in prison, citing *O'Malley v. Brierley*, 477 F.2d 785, 795 (3d Cir. 1973). Significantly, however, the "*O'Malley* court went on to explain: "The regulation [would] be reasonable only if the alternative chosen (complete exclusion) resulted in the least possible 'regulation' of the constitutional right consistent with the maintenance of prison discipline." This "least restrictive alternative" approach is consistent with the one taken by the court below, in reliance upon *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), which appellees support. It is interesting to note the following statement made by appellants in the district court, regarding *Carothers*:

> "We submit that the court in *Carothers* adopted the correct view when it concluded that 'if the state had given some explanation . . . that indicated the action was *reasonably and necessarily* related to prison security or the prisoner's rehabilitation, we would be reluctant to interfere with its internal administration and regulations.'" (emphasis supplied) (A. 82-83).

By omitting *Carothers* from their brief in this Court, appellants seem to have changed their position as to the appropriate legal standard.

(1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), we submit that the general principles are sufficiently flexible to deal with administrative rules of correctional agencies, just as they are with all other governmental agencies. Of course, the results in particular cases will often be different because in may prisoner cases the officials will be able to justify certain restrictions by showing that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation' " of the prison. Cf. *Healy, supra; Tinker, supra*, 393 U.S. at 509.

But such a showing must be "factually supported by the record." Cf. *Healy, supra*, 408 U.S. at 188; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Pickering v. Board of Education*, 391 U.S. 353, 570-73 (1968). Justification for extraordinary restrictions on the rights of individuals cannot be presumed. There must be *evidence* of likely interference with a legitimate correctional interest.[9] And there must be a showing that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Cf. *Healy, supra*, 408 U.S. 189-90 n. 20; *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972) ("the regulation must be narrowly tailored to further the State's legitimate interest"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 n. 8 (1972).[10]

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[9] "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker, supra*, 393 U.S. at 508.

[10] See also, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The court below sensibly recognized that–

"To the extent that *Carothers* [n. 8, *supra*] can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of 'clear and present danger' in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably 'compelling state interests' (See *Carothers, supra,* at 1024), regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights."

Hillery v. Procunier, 364 F. Supp., at 202.[11]

B. The Necessity For Face-to-Face Individual Interviews.

Appellants initially take issue with the district court's finding "that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment." *Hillery v. Procunier,* 364 F. Supp. 196, 200-01 (N.D. Cal. 1973). Appellants contend that prisoners have adequate alternative methods of communicating with the press, to wit, by letters and manuscripts to media representatives (Br. 10), through

[11]Of course, non-First Amendment rights asserted by prisoners would appropriately be judged under a less stringent standard. Cf., *McGinnis v. Royster,* 410 U.S. 263 (1973).

other visitors and correspondence (Br. 11), and by press tours on a random basis (Br. 13).

However, as the district court herein and several other trial courts have found, these alternatives are an inadequate substitute for an individual personal interview.

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Further, there are many prison situations which can only be explored fully and accurately by a face-to-face interview."
>
> *Burnham v. Oswald*, 342 F. Supp. 880, 885 (W.D.N.Y. 1972).
>
> "Newsmen, like lawyers and judges, need to size up those from whom they receive information and the face-to-face interview is the most important technique of doing so."
>
> *Houston Chronicle Publishing Co. v. Kleindienst*, 364 F. Supp. 719, 730 (S.D. Tex. 1973).[12]

And, in *Washington Post v. Kleindienst*, 357 F. Supp. 770, 773 (D.D.C. 1972), which is being argued in tandem with the instant case, the court agreed that–

> "[c]ommunication by correspondence is . . . too impersonal and time consuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write, prison tours and related conversations with individuals or groups

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[12] Accord, *McMillan v. Carlson*, 14 Cr. L. Rptr. 2365 (D. Mass. Dec. 31, 1973); *Globe Newspaper Co. v. Bork*, 14 Cr. L. Rptr. 2444 (D. Mass. Feb. 12, 1974); *Mimms v. Philadelphia Newspapers*, 352 F. Supp. 862, 866 (E.D. Pa. 1972).

are . . . too hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation."[13]

The Court below observed that–

"the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say, may, with bad luck, never be able to say it effectively." 364 F. Supp. at 200.

These findings are not "clearly erroneous," Rule 52(a), F.R.C.P., and they should, therefore, not be set aside.

Curiously, California prisoners engaged in *commercial* writing, for publications, are allowed to meet with their publishers, with official approval on a case-by-case basis (Br. 11-12). (A. 124, 244-45). No such individualized authorization was provided for non-commercial media interviews, under §415.071.[14] Thus, California has

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[13]See also, *Washington Post v. Kleindienst*, 357 F. Supp. 779, 781 (D.D.C. 1972), aff'd, ___ F.2d ___ , 14 Cr. L. Rptr. 2421 (D.C. Cir. Feb. 21, 1974):

"The Court has determined on the basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation."

The "detailed factual findings," referred to above, can be found in Appendix "C" to Appellants' Brief, in *Pell v. Procunier*, No. 73-918, pp. 52-55, which has been consolidated with the instant case.

[14]Director Procunier testified that, as a correctional matter, he would actually prefer a more selective regulation regarding media interviews, but that his attorney advised him that an across-the-board policy was legally mandated (A. 303). No reason was ever given, however, for treating author-publisher meetings any differently.

created the anomalous situation of according protection to commercial speech, while denying it to *free* speech, a disparity that the First Amendment could hardly suffer. Cf. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (impermissible distinction between labor picketing and other peaceful picketing invalidated under Equal Protection Clause.). See also, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.* 413 U.S. 376 (1973).

C. The State's Asserted Justification For §415.071.

In examining the state's asserted reasons for §415.071, the following excerpt from this Court's per curiam opinion in *New York Times v. United States*, 403 U.S. 713, 714 (1971), seems apposite:

> " 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books v. Sullivan, 372 U.S. 58 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)."

The district court evaluated four grounds offered by the state in support of the challenged regulation, and it found them all to be insufficient justification for an across-the-board ban upon personal media interviews of willing prisoners.

1. *Administrative Burden*

The District Court concluded that the state made an insufficient factual showing of administrative burden, observing that, in answers to interrogatories, Warden Nelson stated that "requests by prisoners for interviews

with media are rare, and none are recalled" (A. 54). With respect to the number of interviews requested by outside media persons, the Warden said that the prison had no record of such information (A. 54).

Nevertheless, the court below indicated that reasonable regulations as to the time, place and manner of press interviews could be imposed:

> "[R]egulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible." 364 F. Supp., at 202.

2. *Security*

Warden Nelson was also asked, in Interrogatory No. 11, "Do you view an interview between a prisoner and a media person as a security threat to the institution?" The answer given was, "only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates" (A. 55).

Other interrogatories elicited the following information:

No. 15.

> The substance of prisoners' writings may be the basis for refusing a prisoner permission for an interview related to his writings only if his writings are of a character excludable from the institution pursuant to California Penal Code section 2600. In no case heretofore has an interview been denied for that reason. The substance of a prisoner's writings would not lead me to refuse permission for an interview unrelated to his writings.

No. 16.

> In what instances may the substantive content of different outside media lead you to refuse them permission to interview a specific prisoner?

A: Only if the publication actively and characteristically advocated murder. No refusal on this basis is recalled.

No. 17.

A subsequent interview by the same media person would be refused if that person had engaged in violence or smuggling of contraband into the institution, or had violated the visiting rules. Conduct by an inmate which showed him to be dangerous would prevent him from being interviewed. (A. 56).

Moreover, as the district court found, a very large number of outsiders visit California prisoners daily. 364 F. Supp., at 203.[15] While prison security is a legitimate concern of the defendants, there are available methods less drastic than §415.071 to achieve it, including: limitation of the number of interviews so as to assure adequate supervision by correctional officers; reasonable searches of visitors for contraband, escape plans, or weapons. Also, if authorities have good cause to believe that a *particular* interview threatened prison security, it may be denied.[16]

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[15]The visiting regulations are in the record (A. 100-04). They contain a variety of safeguards to reduce the possibility of any security problems.

[16]Where extraordinary exigent circumstances exist, such as a prison riot, officials of course retain appropriate authority to limit visitation, in order to preserve order and security. E.g., *Burnham v. Oswald*, 333 F. Supp. 1128 (W.D.N.Y. 1971) (post-Attica disturbance: press interviews denied); *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973). See also, *Burnham v. Oswald*, 10 Cr. L. Rptr. 2187 (2d Cir. Nov. 15, 1971) (appeal dismissed by agreement, when news media were permitted to interview Attica prison inmates after emergency conditions had ended); and *Burnham v. Oswald*, 342 F. Supp. 880 (W.D.N.Y. 1972) (final judgment declaring right of press interviews under ordinary circumstances).

3. *Rehabilitation*

Defendants-appellants state in their Brief, at 8:

"Director Procunier has also recognized that if an inmate is continually involved in conducting interviews he will have little time to concentrate on other useful activities such as attendance of classes, meeting with counsellors, obtaining psychiatric treatment and participating in other programs."[17]

Of course, plaintiffs-appellees did not seek, nor did the district court order, continuous and unlimited press interviews, to an extent that might interfere with the rehabilitative process.

The court below found that "little more than vague speculation" had been offered to support the proposition that *any* individual press interviews would frustrate rehabilitation. Accordingly, it correctly concluded that §415.071 was not justified by rehabilitative considerations. If anything, rehabilitation would seem to be served, not hampered, by greater communication with the outside world. See, *Palmigiano v. Travisono*, 317 F. Supp. 776, 788 (D.R.I. 1970), and the "Holt Report" (A.180).

4. *The "Big Wheel" Theory*

The Court below observed:

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[17]Mr. Procunier's quoted statement was part of an affidavit offered to the district court "in explanation and justification" of Adm. Bull. No. 72/40, which had been adopted as an interim regulation after the single district judge entered a temporary restraining order. The particular portion quoted related to a limitation of interviews with a specific inmate to once in any six-month period. (Exceptions to this limitation can be approved) (A. 129-130). Although plaintiffs-appellees have stated their objections to Adm. Bull. No. 72/40 (A. 132-196), it should be noted that the Department of Corrections is quite capable of drafting regulations satisfactory to them, which are far less broad than §415.071.

"Defendants' principal argument in defense of §415.071 rests on the 'Big Wheel' or 'celebrity' theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates."

Hillery v. Procunier, 364 F. Supp., at 203

Notably, appellants never adduced any hard evidence herein to support this unproven theory. Indeed, Director Procunier himself apparently realized that the so-called "Big Wheel" problem could be handled by narrower and more selective regulations,[18] but that his attorney advised against such a move, on legal grounds. (A. 303).

Defendants-appellants' "Big Wheel" argument here resembles the contention advanced, in *Johnson v. Avery*, 393 U.S. 483 (1969), to support a blanket prohibition upon jailhouse lawyers. In reviewing that regulation, this Court acknowledged: "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline." 393 U.S., at 488.[19] Nevertheless, the Court invalidated the ban "unless and until the State provides

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[18]In *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971), prison regulations permitted press interviews with specific inmates, but required prior administrative approval. The denial of such approval as to Bobby Seale, who did not disclaim his reputation as a celebrity, was sustained. Compare, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (Attorney General's legitimate discretion not to waive statutory exclusion of an alien, was sustained). §415.071 contains no provision for the exercise of administrative discretion.

[19]In a dissenting opinion in *Johnson*, Mr. Justice White, joined by Mr. Justice Black, noted that "the most aggressive and domineering personalities may predominate. . . . Many assert that the aim of the jail house lawyer is not the service of truth and justice, but rather self-aggrandizement, profit and power." 393 U.S., at 499.

some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief." Ibid., at 490.

Significantly, the Court added:

> "Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities." Id.

Similarly, in *Lee v. Washington*, 390 U.S. 333 (1968), this Court held that racial segregation of prisoners was constitutionally prohibited, but it carefully pointed out that the orders of the District Court, which were affirmed, did make allowance for "the necessities of prison security and discipline." 390 U.S., at 334. As Mr. Justice Black stated, in a concurring opinion therein, joined by Mr. Justice Harlan and Mr. Justice Stewart, "prison authorities have the right, acting in good faith and in *particularized* circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails," (emphasis supplied). Ibid.

In *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971), the court observed:

> "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and

applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." Ibid., at 1232.

Where, as here, the Director of Corrections declines to defend, as a *correctional* matter, his own overbroad regulation which impairs, not only prisoners' First Amendment rights, but also the public's right to know,[20] then the courts are fully authorized to grant appropriate relief.

CONCLUSION

The district court's judgment in favor of the prisoners is consistent with the decisions of this Court, and with the virtually unanimous opinion of knowledgeable experts in the field of corrections, who endorse the granting of individual press interviews with willing prisoners.[21] The ruling below does not interfere with state

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[20]In *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971), "the public policy relevance of prisoner correspondence was found to implicate the 'right of the public to hear' which in turn 'enhanced' expression rights of the prisoners." Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 Yale L.J. 1337, 1340 (1973).

[21]The National Advisory Commission on Criminal Justice Standards and Goals' Standard 2.17 provides, in part, in the subsection on MEDIA:

> 1. Grant confidential and uncensored interviews to representatives of the media. Such interviews should be scheduled not to disrupt regular institutional schedules unduly unless during a newsworthy event.
>
> 2. Send uncensored letters and other communications to the media.

See, Task Force Report on Corrections, 67 (U.S. Govt. Printing Office 1973). See also, Report of the Forty-second American

administrative expertise or discretion, but rather, unencumbers California prison officials from the consequences of questionable legal advice, which conflicts with the officials' own correctional opinion and preference. For the foregoing reasons, the judgment of the court below, upholding the rights of the prisoner-plaintiffs, should be affirmed.

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Assembly, 8 (Dec. 17-20, 1972, Arden House Harriman, New York); NCCD Model Act for the Protection of Rights of Prisoners §7, 18 Crime & Delinquency 13 (1972); Sigler, *New Partnership in Corrections*, 12 Cr. L. Rptr. 2042, 2043 (Oct. 11, 1972).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS,
Appellants,
vs.
RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

APPELLEES' BRIEF

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California (Appendix A to Appellants' Brief) is reported at 364 F.Supp. 196 (N.D.Cal. 1973).

QUESTION PRESENTED

Does appellants' allegation of a denial of access to sources of information which are not freely available to every citizen state a claim upon which relief can be granted?

STATEMENT OF FACTS

Appellants Eve Pell, Betty Segal and Paul Jacobs entered into this litigation as plaintiffs through an amended complaint filed March 8, 1972 (A. 22-41). The introduction of this complaint set forth the purpose of appellants' joinder in the action:

> "Various media people, including plaintiffs in this complaint, have requested and do desire, to visit specific prisoners, including other plaintiffs in this complaint. The purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter." (A. 23).

Appellant Eve Pell alleged that she was a free lance writer who had written and edited books and magazine articles concerning prisons and racism (A. 24). She also asserted that she was the editor of publications "concerned with the oppression of third world peoples in the United States and also the conditions of the adjustment centers in California prisons" (A. 27). The amended complaint averred that appellant Pell had been denied permission on February 15, 1972, to interview inmate John Larry Spain who was "housed in the adjustment center at San Quentin on August 21, 1971, the day that George Jackson and five others were killed" (A. 27).

Appellant Betty Segal is identified in the amended complaint as a reporter for the weekly newspaper, *Freedom News,* in Richmond, California (A. 24). She claimed that her application to interview inmate Bobby Bly, regarding a law suit he had filed in fed-

eral court, was denied by San Quentin Prison authorities on February 16, 1972 (A. 28). According to the complaint, Mr. Bly's suit involved "allegations that San Quentin officials arbitrarily and unfairly locked up over one hundred prisoners, primarily black and chicano, because of their political beliefs and not because of any violation of prison rules or regulations" (A. 28).

Appellant Paul Jacobs is described in the amended complaint as a television reporter for educational station KQED in San Francisco and, like appellant Pell, as a free lance writer and author of many publications concerning racism and prisons (A. 24). Appellant Jacobs claimed his request to interview inmate Michael Shane Guile at San Quentin Prison was disapproved on February 15, 1972 (A. 28). The purpose of the visit, according to the complaint, was to "discuss prison conditions, recent events at San Quentin, and to obtain his [Guile's] views of racism and the relationship between blacks and whites within the walls" (A. 28-29).[1]

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[1]Subsequent to this issuance of the August 16, 1973, order of the district court, which recognized an inmate's right to press interviews, appellant Jacobs interviewed inmate Guile, and Trish Beall of *Freedom News* interviewed inmate Bly in place of appellant Segal who was no longer associated with *Freedom News;* the interviews took place on January 18 and 21, 1974.

On November 14, 1973, the district court refused to permit the interview between inmate Spain and appellant Pell because at that time Mr. Spain was charged with the murders arising out of the August 21, 1971, events at San Quentin Prison and the state trial court, Superior Court of Marin County, had issued a "gag order" prohibiting public comment on the facts of the case.

The validity of the August 16, 1973, order of the district court, insofar as it granted relief to the inmates, is being challenged by appellees. *Procunier v. Hillery,* USSC 73-754.

Appellants sought declaratory relief and preliminary and permanent injunctions prohibiting appellees from denying them permission for the interviews (A. 29-30).

On April 6, 1972, appellees moved to dismiss the amended complaint for failure to state a claim upon which relief might be granted [Federal Rules of Civil Procedure, Rule 12(b)], and for failure to raise a substantial federal question (A. 43-52).

On February 14, 1973, the three-judge district court had before it appellees' motion to dismiss and appellants' motion for a preliminary injunction (A. 205-206). Appellants stated: "We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoners." (A. 217). Appellants argued that they had a special news gathering right at the prisons and urged the court to recognize such a right (A. 214-218, 266-269). Upon questioning, appellants explained their position:

> "Judge Williams: Isn't what you are contending mean in effect that the press contends they can have special access to information not available to the public generally?
>
> "Ms. Roberts [appellants' attorney]: The press is always in a different position than the public generally. * * *" (A. 217)

Appellants described this position as the media's "special right as representatives of the public" (A. 218). They also referred to it as a "higher right than that of the general public" (A. 266).

Appellants presented no witnesses at the hearing. Appellees, however, called Phillip Guthry [Guthrie], Information Officer of the California Department of Corrections, as a witness in opposition to appellants' motion for a preliminary injunction (A. 239-240). Mr. Guthry discussed the operation and impact of California Department of Corrections Manual Section 415.071[2] during the period of its enforcement, August 23, 1971, through November 1, 1972 (A. 240-241).[3]

During this period the press had "virtually unlimited" access to correctional employees and administrators (A. 241). Moreover, press conferences were held and newsmen were taken on tours of institutions; press releases were issued and brochures were printed (A. 242). In addition, newsmen were permitted to interview inmates, randomly selected, on general topics and special topics (A. 242-247). The only limitation upon news gathering was Section 415.071 which precluded interviews with designated inmates (A. 244-247).

The district court, on August 16, 1973, granted appellees' motion to dismiss appellants' complaint

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[2]This administrative regulation provides: "Press and other media interviews with specific individual inmates will not be permitted." A temporary restraining order, issued on November 1, 1972, prior to the appointment of a three-judge district court enjoined the use of this provision (A. 3).

[3]On February 14, 1973, the three-judge district court granted a motion by the American Civil Liberties Union, *amicus curiae*, to file a memorandum on behalf of six members of the press, and granted appellees ten days to respond (A. 4, 204). On February 23, 1973, appellees filed a memorandum in response and attached thereto the transcript of appellee Procunier's testimony in *Washington Post v. Kleindienst*, 357 F.Supp. 770 (D.D.C. 1972) (A 272). Appellee Procunier likewise discussed the operation and impact of Section 415.071 (A. 288-291, 300).

(Appellants' Brief, Appendix A, p. 47). The district court found, contrary to the allegations and arguments of appellants, that "the press enjoys no greater right to access to news sources than the average citizen" (Appellants' Brief, Appendix A, p. 34). Furthermore, the court noted that Section 415.071 was not a total ban and that the press was given the freedom to enter the California institutions and interview inmates at random (Appellants' Brief, Appendix A, pp. 34, 36). The court also recognized that Section 415.071 did not constitute a prior restraint or restriction on what the press might publish and did not constitute an express or implied command that the press publish that which it preferred to withhold. (Appellants' Brief, Appendix A, p. 35).

SUMMARY OF ARGUMENT

Appellants Eve Pell, Betty Segal, and Paul Jacobs claimed that they had a right under the First Amendment, which is not enjoyed by the average citizen, to access to individual prisoners selected by them for interviews. As the First Amendment does not grant a right to some citizens, of access to a source of information which is not freely open to all citizens, appellants' complaint was properly dismissed.

Although prisons are traditionally closed to the public, appellees afford members of the general public access to the state's correctional facilities. The general public may view the facilities and may participate in inmate programs. Appellees afford newsmen at least as much. Appellees facilitate newsgathering by permitting newsmen to interview any inmate on

any subject during the course of an institutional visit, by permitting newsmen to sit in on inmate programs and to interview inmate participants, and by authorizing special reports and studies by newsmen which may involve direct contact with inmates.

Although no member of the general public has a constitutional right to enter a prison and to visit with an inmate designated by him, appellees afford certain persons limited visiting privileges with inmates designated by them. These exceptions are reasonable in that they serve to foster rehabilitation by affording an opportunity for the establishment of personal relationships which benefit the inmate. These exceptions do not constitute an invidious discrimination against any member of the general public, including appellants, and thus appellants' complaint was properly dismissed.

ARGUMENT

I

AS THE FREEDOM TO PUBLISH IS A PERSONAL RIGHT ENJOYED BY ALL CITIZENS, APPELLANTS DO NOT HAVE A RIGHT OF ACCESS TO SOURCES OF INFORMATION WHICH ARE NOT OPEN TO ALL CITIZENS, AND THUS THEIR COMPLAINT WAS PROPERLY DISMISSED.

The guarantee of freedom of the press is not a guarantee to a particular group, but rather is a guarantee to all citizens of a particular mode of expression. As observed by this Court, "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and

opinion.' (Citation omitted)." *Branzburg v. Hayes,* 408 U.S. 665, 704 (1972). "History shows us that the Founders were not always convinced that unlimited discussion of public issues would be 'for the benefit of all of us' (footnote omitted), but that they firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion.' (Citation omitted)." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 149-150 (1967). Accordingly, the right which is guaranteed may be more aptly described as the freedom to publish. As the right to publish is enjoyed by all citizens (*Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 388 (1969)), the right cannot be invoked as a basis for affording to certain persons privileges which are denied to other citizens. *See Branzburg, supra,* 408 U.S. at 704.

Moreover, dividing citizens into categories of "newsmen" and "non-newsmen" for the purpose of defining persons who would be constitutionally entitled to privileges not afforded to every citizen would be a most difficult task. As observed by this Court, "The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, . . . [n. 40]. Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity . . . It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into

the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste (Citations omitted). By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." *Branzburg v. Hayes, supra,* 408 U.S. 665, 705 (1972).[4] This Court has likewise recognized the difficulties inherent in drawing distinctions on the basis of the public's desire to receive information. In *Kleindienst v. Mandel,* 408 U.S. 753, 768-769 (1972), this Court observed: "In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well-known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under §212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary dis-

[4]*See generally, McMillan v. Carlson,* ..... F.Supp. ....., Civ. 72-2551-M (D.Mass. Dec. 31, 1973) (recognizing *inter alia* that an author who is engaged in the preparation for writing a book which will contribute to the flow of information regarding a public event is engaged in newsgathering; slip opinion at 5); *Application of Cepeda,* 233 F.Supp. 465, 473 (S.D.N.Y. 1964) (holding *inter alia* that author of magazine article does not come within news reporters' privilege statute).

cretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audiences' interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious." Accordingly, practicalities militate against arriving at a definition of newsmen who are to be given a distinct constitutional status.

As recognized by this Court, "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *New York Times Co. v. United States,* 403 U.S. 713, 728-730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns. v. Valente,* 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954)." *Branzburg v. Hayes, supra,* 408 U.S. 665, 684 (1972).[5] As the right of freedom to publish is

[5]*Accord, Trimble v. Johnston,* 173 F.Supp. 651, 656 (D.D.C. 1959); *Azbill v. Fisher,* 442 P.2d 916, 918, 84 Nev. 414 (1968); *Yarish v. Nelson,* 27 Cal.App.3d 893, 899, 104 Cal.Rptr. 205 (1972); *Los Angeles Free Press Inc. v. City of Los Angeles,* 9 Cal.App.3d 448, 455, 88 Cal.Rptr. 605, 610 (1970).

Where a source of information is freely available to any member of the general public, First Amendment considerations may be relevant. As recognized by this Court, "Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Branzburg v. Hayes, supra,* 408 U.S. 665, 707-708 (1972).

guaranteed to every citizen, and as clear distinctions among publishers are practically impossible, the validity of these holdings is obvious. Freedom to publish does not entail awarding special privileges to certain individuals. *See Branzburg, supra,* 408 U.S. at 690; *Estes v. Texas,* 381 U.S. 352, 540 (1965); *id.* at 584 (WARREN, C. J., concurring); *id.* at 589 (HARLAN, J., concurring).

In the amended complaint, appellants each averred that he had been denied permission to meet with a specified prisoner (A. 27-29). At the hearing before the three-judge court, appellants stated: "We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoner" (A. 217).[6] Rather, it was appellants' contention that a publisher had "a higher right than

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[6]If appellants had contended that the First Amendment grants every citizen a right to enter a penal institution for the purpose of meeting with an inmate designated by the citizen, such a contention would have had to be rejected. "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *Branzburg v. Hayes,* 408 U.S. 665, 684 (1972).

A penal institution is not a public forum. *Cf. Grayned v. City of Rockford,* 408 U.S. 104, 121 n. 49 (1972). Penal institutions, built for security purposes, are traditionally not open to the public. *Adderley v. Florida,* 385 U.S. 39, 41 (1966). Citizens do not have a constitutional right to enter a penal institution. *See O'Malley v. Brierley,* 477 F.2d 785, 793 (3d Cir. 1973). Accordingly, any contention that denying a citizen an opportunity to meet with an inmate designated by the citizen is a violation of the citizen's rights under the First Amendment must be rejected for no such right exists within this context. *See O'Malley, supra,* 477 F.2d at 793.

that of the general public" (A. 266). As appellants thus claimed that they had a "higher right" than "individuals on the street" to access to specific prisoners, they failed to state a claim on which relief could be granted.

II

APPELLANTS, AS MEMBERS OF THE GENERAL PUBLIC, HAVE NOT BEEN SUBJECTED TO UNLAWFUL DISCRIMINATION.

Appellants assert that the district court misconstrued their claim as they were only seeking the visiting privileges which were afforded to family and friends, clergy and attorneys, and special purpose visitors (Appellants' Brief at 10-11). Appellants assert that the denial of the same visiting privileges to the press constitutes an unlawful discrimination (Appellants' Brief at 11-13).

No allegations in the amended complaint suggest such a claim. Appellants' averment that "the public is unable to obtain this information on its own" (A. 23) negates any implication that appellants were claiming something other than a special right of access. Moreover, at the hearing before the three-judge court, appellants explicitly stated that they should not be subject to a limitation which is attached to certain types of visiting privileges.[7]

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[7]The visiting regulations which were in effect at San Quentin State Prison at the time the amended complaint was filed, as well as those which were in effect a year later, included the following limitation: "No person will be permitted to visit with more than one (1) inmate of the California Department of Corrections unless

As appellants failed to allege any facts to substantiate a claim that appellees had unlawfully discriminated between them and such special visitors, the amended complaint was properly dismissed.[8] Moreover, it is apparent from the testimony of Mr. Guthry, which was introduced in opposition to appellants' motion for a preliminary injunction, that appellees have not unlawfully discriminated against the press. Indeed, the press has been treated quite well (A. 243-244).

Appellants' current contention is in significant respects *sui generis*. The distinctive qualities of appellants' assertion flow from the particular circumstances of this case, and from the general attributes of a penal institution. As observed by Justice Rehnquist "a long line of decisions by this Court has recognized that the 'equal protection of the laws' guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent way in the multitudinous fact situations that may confront the courts (Footnote omitted)." *Cruz v. Beto*, 405 U.S. 319, 325-326 (1972). When appellants' contention is evaluated in reference to the unique factual context in which it is presented, it clearly fails to state a claim upon which relief can be granted.

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said person is a member of the immediate family of both inmates." (A. 72, 103). At the hearing before the three-judge court appellants asserted: "By nature of the press' rights as defined in the First Amendment, I think that they can rise above the mere limitations to visit one prisoner so that they can visit other prisoners." (A. 270).

[8]It should be observed that appellants were represented by counsel (A. 1).

First, this is not a case wherein there is an absolute denial of an asserted benefit. *See generally, Rosario v. Rockefeller,* 410 U.S. 752, 756-759 (1973); *McDonald v. Board of Election,* 394 U.S. 802, 807-808 (1968); *cf. Kusper v. Pontikes,* ..... U.S. ....., 94 S.Ct. 303, 309 (1973); *O'Brien v. Skinner,* ..... U.S. ....., 38 L.Ed.2d 702, 708 (1974). A showing that there is no absolute denial of the asserted benefit militates against the finding of a suspect classification. *See San Antonio School District v. Rodriguez,* 411 U.S. 1, 23-25 (1973).

As found by the district court, "The regulation [section 415.071] does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population (Footnote omitted). Thus, media representatives are able to interview an inmate, . . . " (Appellants' Brief, Appendix A, at p. 34). The district court also recognized that the practice under section 415.071 was distinguishable from the regulation which is currently before this Court in *Saxbe v. Washington Post Company,* USSC 73-1265 (Appellants' Brief, Appendix A at pp. 35-36).

The findings of the district court are clearly substantiated by the testimony of Mr. Guthry. Newsmen were permitted to tour the state's correctional institutions, and such tours could encompass both the maximum and minimum security sections of the institution (A. 243-244, 259). During the course of such tours, newsmen could interview any inmate on any

subject (A. 243-244). If it was desired, the prison personnel would step aside in order that the interview would be confidential (A. 243-244).[9] Newsmen could also interview inmates who were randomly selected for the purpose of writing a story on a specific topic (A. 242-243). If a newsman wished to do a story on a specific program, such as alcoholics anonymous or an ethnic study course, he could sit in on the group meeting and interview the inmate participants (A 243). Newsmen were also assisted in preparing stories on special topics. When a newspaper informed the Department that it wished to interview life inmates on their opinion of capital punishment, the Department asked three different institutions to select representative inmates. The reporters interviewed the inmates and wrote a story (A. 242-243). Similarly, at the time that death row was being phased out, a television reporter asked to film activities on death row and to speak to inmates whom he might encounter. The television reporter was permitted to conduct this film interview (A. 243). The Department did not exercise any control over what was ultimately written or published as a result of these interviews between newsmen and inmates (A. 244). Quite a few of the stories which were published were critical (A. 260). Consequently, the only limitation upon news gathering was that the newsman could not specify by name the inmate whom he wished to interview.

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[9]It should be noted that, respecting non-privileged communications, "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. New York*, 370 U.S. 139, 143 (1972).

By comparison, the regulation which is at issue in *Saxbe v. Washington Post* provides only for spontaneous contacts during supervised, inspection tours; it limits the topics which may be discussed; it also limits the duration of any such conversations to five to ten minutes; and newsmen are requested not to identify any inmate. *Washington Post v. Kleindienst,* ..... F.2d ..... (D.C. Cir. Feb. 21, 1974), *cert. granted, sub nom. Saxbe v. Washington Post,* ..... U.S. ..... (March 4, 1974).[10]

Secondly, this is not a case wherein the limitation results in the curtailment of a constitutional right. As recognized by this Court, penal institutions are built for purposes of security, and are traditionally not open to the public. *Adderley v. Florida, supra,* 385 U.S. 39, 41 (1966). Citizens do not have a constitutional right to enter a penal institution. *See O'Malley v. Brierley, supra,* 477 F.2d 785, 793 (3rd Cir. 1973).[11] Representatives of the news media have no constitutional right of access to information which is not available to the general public. *Branzburg v. Hayes, supra,* 408 U.S. 665, 684 (1972). As is apparent from the testimony of Mr. Guthry, every member of the general public does not have an absolute right

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[10]The decision of the Circuit Court for the District of Columbia appears at Appendix F to the supplemental petition for a writ of certiorari in *Saxbe v. Washington Post Company,* USSC 73-1265.

[11]Accordingly, decisions which concern access to places which are freely accessible to any citizen (*e.g., Police Department of Chicago v. Mosley,* 408 U.S. 92, 94 (1972); *Channel 10 Inc. v. Gunnarson,* 337 F.Supp. 634, 638 (D.Minn. 1972)), are inapposite. *See Zemel v. Rusk, supra,* 381 U.S. 1, 16-17 (1965).

to meet with any inmate whom he may designate (A. 262-263).[12]

However, as is likewise apparent from the testimony of Mr. Guthry, the general public is not barred from the state's correctional institutions. Members of the general public may take tours of the institutions (A. 246).[13] Members of the general public may

[12]It is likewise apparent from the visiting regulations which were in effect at San Quentin State Prison in November of 1972, that persons who are approved as a visitor for a specific inmate must satisfy conditions and must observe various limitations. The requesting inmate must fill out a form; the proposed visitor must then fill out a form; these must be examined for consistency (A. 101). Visiting may be restricted if the relationship is harmful to the inmate, the visitor, or any other person (A. 100). The number of persons who may be approved as visitors for a specified inmate is limited (A. 100). The number of visits which an approved visitor may have with a specific inmate is limited (A. 100, 103). A visitor may meet with only one inmate (A. 103). An exception is made if the visitor is a member of the immediate family of more than one inmate (A. 103). The visiting regulations which were in effect at the time the amended complaint was filed were even more restrictive. Under these regulations no person could be approved unless he was a member of the inmate's family or a friend of long-standing (A. 69).

[13]For example, at the time the amended complaint was filed, San Quentin State Prison had the following regulation pertaining to such tours:

"A. Public tours of the institution:

1. During the months of February through October, tours of mixed groups, societies, clubs, etc., of approximately 200 adults, are conducted on Saturday nights. A charge is made to cover costs of food, escort, and a contribution to the Inmate Welfare Fund. The Officer of the Day is ordinarily in charge.

2. Specific reservations are required for individuals or groups. Arrangements are made through staff designated by the Warden.

3. Tours by approved special guests will be arranged by the Warden's Office at any time during the normal working day. The Custodial Division will furnish officer escort, unless otherwise arranged; i.e., educators may be escorted by staff of the Education Department, etc. Such tours begin and end in the Warden's office, with an interview with the Warden or the Associate Warden, Administration, if possible." (A. 66-67).

also participate in institutional programs (A. 246).[14] Newsmen are likewise permitted to tour the institutions (A. 243-244, 259), and to observe institutional programs (A. 243). Accordingly, newsmen are clearly not denied access to sources of information which are available to the general public.

On the contrary, the testimony of Mr. Guthry indicates that newsmen were in fact given special attention:

> "Q. Now, between the period of August, 1971 and November, 1972, what were the procedures within the Department of Corrections for media access to administrators and employees of the Department?
>
> A. Well, press has virtually unlimited access to employees and administrators. In fact, we go out of our way to try to make ourselves available and to service the media, recognizing the role they play in keeping the public informed.
>
> Q. Now, what methods or means are used to inform the press through the administrators and the employees in the Department?
>
> A. In this period in particular, we were in an arduous period and we had a great many inquiries. I had days of 80 inquiries.

---

[14] For example, at the time the amended complaint was filed, the following regulation was in effect at San Quentin State Prison:

"B. Citizen participation in the institutional program:

1. Trade Advisory Groups working with both staff and inmate committees.

2. Academic Advisory Committee (works with staff and inmate committee).

3. Citizen volunteers (working with Alcoholics Anonymous, Speakers Clubs, athletic events, and other inmate groups)." (A. 67).

Beyond that, you have press conferences, and hand out press releases, we print brochures, we take newsmen on tours through institutions and permit them to interview staff and inmates and, in general, make a real serious effort to work with the media so they can get the information they want.

Q. What were the procedures for access to institutional facilities themselves by members of the media?

A. I can give you an example. Say, a newsman was interested in doing a particular story in a prison. He might call the prison director or he might contact me.

If he contacted me, I would deal with the institution, explain what the nature of the story he wanted to do, and arrange for him to enter the institution, talk to inmates, staff, see the facilities and, generally try to help him find whatever information he wanted" (A. 241-242).

Thirdly, this is not a case which presents the question of the validity of the exclusion of persons from a public place (*cf. Police Department of Chicago v. Mosley, supra,* 408 U.S. 92, 94 (1972)), but rather the question of determining what type of access may be granted to an area which traditionally is closed to the public (*Adderley v. Florida, supra,* 385 U.S. 39, 41 (1966)). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley, supra,* 385 U.S. at 47. The public has no constitutional right to enter a prison. *See O'Malley v. Brierley, supra,* 477 F.2d 785, 793,

795 (3rd Cir. 1973). As recognized by this Court, a state has a strong interest in the administration of its prisons (*Prieser v. Rodriguez,* 411 U.S. 475, 491-492 (1973)), and traditionally such facilities have not been open to the public (*Adderley, supra,* 385 U.S. at 41).

By virtue of state law, "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in [appellee Procunier]." Cal. Pen. Code § 5054. Accordingly, appellee Procunier must necessarily have the authority to determine whether persons are to have access to the state's correctional institutions, and the type of access which is to be permitted. *Cf. Kleindienst v. Mandel, supra,* 408 U.S. 753, 765-767 (1972).[15] As recognized by this Court, "prison officials must be accorded latitude in the administration of prison affairs, . . ." *Cruz v. Beto, supra,* 405 U.S. 319, 321 (1972). In exercising their discretion, prison officials may clearly give consideration to the maintenance of security and the fostering of rehabilitation, as these are obviously justifiable objectives. *See McGinnis v. Royster,* 410 U.S. 263, 273-276 (1973).

Given these three considerations, appellants' current assertion should be evaluated under the traditional standards. See also *San Antonio School Dis-*

[15]Appellee Park has set forth his objections to legislation which would restrict the authority of prison officials to determine whether any citizen may visit with a specific inmate. Park, *On Being Medium Nice to Prisoners,* Wash.U.L.Q., 607, 615 (1973).

trict v. Rodriguez, supra, 411 U.S. 1, 19, 40-44 (1973); *Rosario v. Rockefeller, supra,* 410 U.S. 752, 756-758 (1973); *McDonald v. Board of Election,* 394 U.S. 802, 807 (1968). "[M]ere classification, as this Court has often said, does not of itself deprive a group of equal protection (Citation omitted)." *Carrington v. Rash,* 380 U.S. 89, 92 (1965). " 'The constitution does not require things which are different in fact . . . to be treated in law as though they were the same' (Citation omitted)." *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966). "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery v. Midland County,* 390 U.S. 474, 484 (1968). "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts (Citations omitted)." *United States v. Maryland Savings—Share Ins. Corp.,* 400 U.S. 4, 6 (1970). "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' (Citation omitted); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked (Citation omitted)." *McDonald, supra,* 394 U.S. at 809.

Though prisons be closed to the public generally, appellees may reasonably allow certain persons to

visit individual inmates at the request of the inmates. As recognized by appellants: "Admittedly, each of these visiting groups has some kind of more than 'average' interest that makes a visit necessary, . . ." (Appellants' Brief at 11). The protection of an inmate's legal rights is clearly a rational basis for permitting attorneys to visit with specific inmates. The enhancement of inmate's religious practices is clearly a rational basis for permitting clergy to visit with a specific inmate. Considerations of rehabilitation obviously afford a reasonable basis for determining that an inmate may have visits from members of his family and other persons whose relationship with the inmate has a beneficial effect upon the inmate. The fact that California's correctional institutions have adopted laudable policies, permitting certain persons to visit with individual inmates, should not render such policies an invidious and arbitrary scheme. *Cf. McDonald v. Board of Election, supra,* 394 U.S. 802, 810-811 (1969).

Appellees have determined that every citizen should not be permitted an absolute privilege to visit with any inmate whom he may designate, no matter how willing the inmate. Considerations of efficient administration obviously dictate that limitations be placed on visits with specific inmates; considerations of security clearly dictate that the persons who may be permitted to visit with a specific inmate be restricted; considerations of rehabilitation clearly dictate that a specific inmate's associations with others be closely supervised. These are fundamental factors in the

operation and administration of correctional institutions.[16]

Appellees have not adopted a rigid approach to public access to the state's correctional institutions. Citizens are permitted to tour the institutions and to participate in inmate programs (A. 246). Appellees have not excluded news representatives from such access (A. 243-244, 259). On the contrary, appellees have in fact given added consideration to news representatives by assisting them in gathering news through interviews with inmates and staff (A. 241-242).

---

[16]Appellees' determination not to afford news representatives a type of access different from that afforded the general public was based on these considerations. As stated by the district court: "Prior to the implementation of § 415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960's such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon of the 'prison celebrity' or 'big wheel'—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the 'celebrity' over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison. [¶] It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem." (Appellants' Brief, Appendix A, at p. 33). As is fully set forth in Appellants' Brief in *Procunier v. Hillery*, USSC No. 73-754, this determination did not abridge the rights of inmates as it is rationally related to the furtherance of the legitimate objectives of the penal system.

Accordingly, even if appellants had alleged in their amended complaint that certain persons were approved as visitors of requesting inmates whom they designated by name, they would not have stated a claim upon which relief could be granted. Appellees' decision that certain persons but not all persons should be permitted to visit with inmates specified by name is clearly a reasonable determination which relates to appellees' legitimate interests in fostering rehabilitation, maintaining security and, particularly in the instant case, restoring order.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order of the district court dismissing appellants' amended complaint must be affirmed.

Dated, April 3, 1974.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants,*

vs.

BOOKER T. HILLERY, JR., et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Appellees, in defense of the district court's order, characterize California Department of Corrections Manual Section 415.071[1] as a "total ban" of all press

[1]"Press and other media interviews with specific individual inmates will not be permitted." Appellants were compelled by a temporary restraining order to cease enforcement of this Section on November 1, 1972, and to substitute interim procedures. No stay of the August 16, 1973, decision was sought inasmuch as a stay would not have permitted the use of Section 415.071. On March 26, 1974, the district court continued the proceedings until June 7, 1974, in expectation of the disposition of the appeals in this Court.

interviews with designated, willing prisoners, at all penal institutions and under all circumstances. The decision of the district court is not premised on such a finding; appellees set up a "straw man" to attack when the real issue is elsewhere. The California Department of Corrections has never imposed a "total ban" on inmate access to the press. The district court found that the "regulation does not effect an absolute ban on all media interviews with inmates" (Jurisdictional Statement, Appendix A, p. V). The decision, rather, turns on the finding, which appellants urge is erroneous, that face-to-face interviews with media representatives are a "vital element" in the prisoners' rights under the First Amendment.

By arguing that Section 415.071 is a "total ban," in spite of the district court's finding and the undisputed evidence to the contrary, appellees facilitate their jump to a conclusion that a right of free speech has been violated and, as an apparent afterthought, a right to petition the government for redress of grievances has been imperiled. This new choice of argument would appear to limit the asserted right to interviews to inmates who wish to relate complaints about prison conditions, and to exclude inmates who wish to discuss other subjects. *cf. McMillan v. Carlson*, ...F.Supp. ....., Civ. 72-2551-M, slip op. at 3-4 (D. Mass. Dec. 13, 1973). However, the perspective of this case is quite different and the thrust of this appeal cannot be diverted by changing the context of the facts and the law.

The district court correctly found that the "tragic events of August 21, 1971" were viewed by prison

administrators as the climax to mounting disciplinary problems caused, in part, by a "laissez-faire policy with respect to press interviews with inmates" (Jurisdictional Statement, Appendix A, pp. IV-V). Where the district court erred was in determining that the Director of Corrections, faced with the circumstances of August 21, 1971, improperly ordered his subordinates to limit inmates' face-to-face interviews to interviews based on a random selection. Appellants maintain, and their arguments remain substantially unanswered, that the First Amendment does not afford inmates Hillery, Spain, Bly and Guile the right to demand and conduct face-to-face sessions with the press or other media representatives; that appellants, as responsible prison administrators, have discretion to manage their prisons by a measure such as Section 415.071; that Section 415.071 is rationally related to justifiable purposes of imprisonment; and that in any event the inmates have alternative means of exercising speech and seeking redress of grievances.

ARGUMENT

I

THE POLICY RESPECTING INTERVIEWS DOES NOT ENCROACH UPON ANY FIRST AMENDMENT RIGHT OF THE PRISONERS.

Appellees accurately point out that this Court has, on many occasions, acted to assure prisoners the right to petition for judicial relief. California courts have been equally alert in these matters. *See, e.g., In re*

Jordan, 7 Cal.3d 930, 500 P.2d 873, 103 Cal.Rptr. 849 (1972); *In re Van Geldern,* 5 Cal.3d 832, 489 P.2d 578, 97 Cal.Rptr. 698 (1971); *In re Harrell,* 2 Cal.3d 675, 470 P.2d 640, 87 Cal.Rptr. 504 (1970). California Penal Code section 2600 permits an inmate to correspond confidentially with any member of the state bar or public office holder, to own written material produced during imprisonment and to purchase, receive and read all books and periodicals accepted for distribution by the United States Post Office. California Government Code section 845.4 makes prison officials liable for intentional interference with the right of a prisoner to obtain judicial review of his confinement.

The Director of Corrections, under California Penal Code section 5058, must issue rules to protect the inmates in his care. These rules, *inter alia,* allow an inmate to correspond by sealed letter to the Governor, the Secretary of the Health and Welfare Agency, the Director, the Chief Deputy Director, an elected member of the state or federal Legislature, any other elected state or federal official, any appointed head of state or federal agency, or to the administrative head of the state or federal parole agency or board responsible for custody or release (Rule DP-2404); prevent opening and censoring of sealed correspondence from an inmate to a court (Rule DP-2403); recognize attorney-client privilege in written communications and prohibit auditory monitoring of attorney visits (Rule DP-2705); authorize emergency telephone calls between inmates and attorneys without monitoring (Rule DP-4213).

Grand juries have access to the prisons (Cal. Pen. Code §§ 919, 921) and committees of the Legislature are alert to prison problems and needs (*e.g.*, California Senate Select Committee on Penal Institutions).

A constitutional right of prisoners to face-to-face conferences with the press cannot be presumed to exist. Because a visit is sought by the prisoner with a person bearing press credentials does not generate a First Amendment right.

Appellant Procunier is responsible for the security of the California prisons and the care and rehabilitation of the people confined in them. Restricting prearranged personal contact between people on the inside with people on the outside is a reasonable action within the scope of his discretion, and does not involve a First Amendment right merely because press representatives are among those restricted.

Limiting personal contacts between appellees and the general public, which includes newsmen, is a matter of prison administration and not of federal constitutional right.

Appellees argue in terms of the "crucial role played by the press" in bringing to the public's attention information concerning prison conditions.[2] The issue here, however, is the demand of appellees, who are prisoners, to personally meet with press representatives. By Section 415.071 the prison authorities limit, but do not bar, such meetings or conferences. Inter-

[2]The record is unchallenged respecting the expansive program of the California Department of Corrections to assist the press in gathering news (*see* Appellants' Opening Brief, pp. 13-14; testimony of Phillip Guthry, A. 240-246; *see also* A. 59-68).

views may occur at random or in the setting of a discretionary special purpose visit (A. 51, 244-245).

II

THE POLICY RESPECTING INTERVIEWS IS A VALID EXERCISE OF APPELLANTS' AUTHORITY TO MANAGE PRISONS

The evidence in the district court established a "compelling state interest" which demanded the adoption of Section 415.071: the incident of August 21, 1971, alone would demonstrate this for among those who died that Saturday was the inmate who had been the subject of the greatest number of personal interviews. Nevertheless, the prison officials were not required to demonstrate this "compelling interest." *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1069 (9th Cir. 1973). The Seventh Circuit has recently reaffirmed the inappropriateness of this test in evaluating a restriction on an inmate's correspondence. *Morales v. Schmidt,* ..... F.2d ....., No. 71 C 29 (7th Cir., March 22, 1974) (en banc). The circuit court remanded the case to the district court, holding that the "district court erred in its holding that the standard which the state was required to meet to justify its restriction on Morales engaging in correspondence with his sister-in-law was to demonstrate a compelling interest." *Morales, supra,* slip op. at 3.[3]

[3]Although the Seventh Circuit correctly recognized that the compelling state interest test was inappropriate, appellants do not agree with the further finding that "the State must show on challenge that such restriction is related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment." *Morales v. Schmidt,* ..... F.2d ....., No. 71 C 29, Slip Op. at 3 (7th Cir. March 22, 1974) (en banc).

In the ambit of prison affairs the control of face-to-face meetings, whether between family member and inmate, or between clergyman and inmate, or between newsman and inmate, does not encroach upon a constitutional right. At most such regulation need meet a rational basis standard.

The record shows that Section 415.071 was promulgated on the Monday following the killings, after a great deal of agonizing, after consideration of other versions, with legal advice and, in view of the prior unrestricted interview policy, with reluctance.[4]

A curtailment of face-to-face meetings is not a cleaver which severs the inmates' contact with the press, with the public, or with the public through the press. Meetings with newsmen do not assure dissemination of the messages of Hillery, Spain, Bly and Guile to the public. Consequently, the "necessity" for confrontation urged by appellees is diminished and the conference becomes, at most, a convenient means of access to the press; it does not assure access to the

---

[4]In the *Washington Post* proceedings, the Director of Corrections, appellant Procunier, testified: "[I]n order to correct the situation that was getting out of hand, in my opinion, after consulting with the wardens and my staff, time after time, to avoid putting in the very policy we have, because this disturbs me greatly, we had to go to this. Our relationship with the press has always been fine. I would prefer not to have this rule" (A. 302). In making his decision, appellant Procunier declined to administer the rule on the basis of the particular institution in which the inmate was housed, but applied it "across the board" (A. 303). The impact of these events was by no means isolated in San Quentin Prison. *See In re Henderson*, 25 Cal.App.3d 68, 72-73, 101 Cal.Rptr. 479, 481-482 (1972) (planned revolt at Folsom Prison in Sacramento County); *In re Hutchinson*, 23 Cal.App.3d 337, 341, 100 Cal.Rptr. 124, 126 (1972) ("time of great tension" at Deuel Vocational Institution in San Joaquin County).

public. It is not a *sine qua non* of the First Amendment.

Appellees Hillery, Spain, Bly and Guile made no showing that they are unable to transmit their manuscripts or to communicate information to those outside of the prison. The alternatives of written communication, of random interviews, of third party transmission have been available to them. Certainly, more personal and less time consuming means of communication may be imagined—such as unrestricted and unsupervised inmate access to all members of the public—but the hazards of each new expansion of the liberty of the legally confined must be measured against penal objectives, such as security in housing and preparation for return to free society (A. 292).

Section 415.071 is particularly suited to meet its objective and, at the same time, afford the inmate access to the press. The objective was a correctional answer to the crisis of August 21, 1971, which was brought on in part by press attention to disruptive, uncooperative and celebrated inmates (A. 246-249, 284-288). In *Estes v. Texas,* 381 U.S. 532, 545-550 (1965), the impact of television upon the lives of jurors, attorneys and judges in a trial setting was discussed. A similar disrupting consequence upon persons in a prison environment would not be purely hypothetical. Yet the design of Section 415.071 was to avoid unequal treatment of inmates which might result by the imposition of categories of those who could and those who could not have face-to-face interviews or, of institutions which permitted or did not permit

face-to-face interviews (A. 303). No classification of newsmen was attempted, either. Rather, a program giving inmates generally, or in the course of their institutional activities, access to visiting newsmen on assignment, was continued (A. 241-247, 290-294). In addition, writers with special projects have access, in the discretion of the Department, to inmates engaged in the activity or in the particular status under study (A. 244-246).[5] This is the same degree of access as given an approved member of the public who enters an institution to participate in a bridge club, a cultural event or a social program (A. 246).

Appellee Hillery sought publication of two short stories; appellee Spain is identified as a "talented black writer"; appellee Bly is a litigant in a pending court action; appellee Guile is described as a white prisoner apparently with views on racism and the relationship between blacks and whites "within the walls" (A. 26-29). An absence of literary skill is not even suggested. Nevertheless, even if it were assumed that appellees were unable to communicate in writing, they are not restrained from seeking help from other inmates and staff, or from orally communicating through approved visitors such as family members and friends, or through attorneys. *See Price v. Johnson,* 334 U.S. 266, 285 (1948) (no absolute right to oral argument); *Johnson v. Avery,* 393 U.S. 483

[5]Contrary to appellees' assertion, California does not distinguish between prisoners engaged in commercial writing and those not seeking remuneration (A. 124, 244-245). Those inmates who do receive payment for their manuscripts are authorized to keep their profits. *See In re Van Geldern, supra,* 5 Cal.3d 832, 489 P.2d 578, 97 Cal.Rptr. 698 (1971).

(1969) (inmate assistance in preparing written court pleadings); *Haines v. Kerner,* 404 U.S. 519 (1972) (less stringent standards for inmate drafted pleadings). While a California inmate is allowed to confer with his attorney to assure his access to the courts and protect his legal rights, or to meet with his clergyman in the exercise of his religious faith, or to visit with approved family members and friends to encourage his rehabilitation, no legal principle or penological consideration allows him to demand a personal meeting with a member of the press in lieu of other alternatives available to him.

In *Seattle-Tacoma Newspaper Guild v. Parker, supra,* 480 F.2d 1062 (9th Cir. 1973), federal prisoners joined in a suit brought by the press attacking a prison regulation which barred individual interviews. Like Section 415.071, the federal rule emanated from serious prison disorder in 1971, and was an abandonment of prior policy which afforded inmates relatively unfettered access to the press. The rule, unlike the California provision, was close to an absolute ban: " 'Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.' " 480 F.2d at 1064, n. 5. The Court of Appeals sustained the provision:

> "The Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison and the safety and

rehabilitation of its inmates, and accordingly they must be given wide discretion in formulating rules to govern prison life. In the instant case the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any rational and constitutionally acceptable concept of a prison system.' *Sostre v. McGinnis,* 442 F.2d 172, 199 (2d Cir. 1971) (en banc). We find that the interview ban is reasonable action within the scope of the wide discretion of the prison administrators and that it does not violate the prisoners' First Amendment rights. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969).

In concluding that the institutional concerns override the interest of the individual inmate in talking face to face with a member of the news media, we note that such a deprivation will not allow any real complaint about the treatment of the inmate or the administration of the prison to go unredressed. Prisoners are allowed by Bureau regulation to confer freely with their counsel, to conduct unlimited confidential correspondence, to visit with relatives and friends, to counsel with clergymen of their faith, and most important, to have free access to the courts. This court, as others, gives prompt and careful attention to prisoner petitions alleging violations of civil rights and counsel is appointed to assist the prisoner in those cases where the need therefor is demonstrated. [Footnotes omitted]." 480 F.2d at 1065-1066.

The *Seattle-Tacoma* case is indistinguishable from the instant case.

Even absent the factor of prison disorder, appellees' incarceration caused the necessary withdrawal or limitation of many privileges and rights. Access to the press, whether viewed as a privilege or a right, is not a vested interest of any citizen. *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 126-127 (1973). The factor that access is sought in a prison facility is a significant consideration. *Adderley v. Florida,* 385 U.S. 39, 47 (1966). Face-to-face access is a further factor. *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972); *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965). In free society First Amendment rights may be curtailed based on the peculiar status of the individual. *United States C. Serv. Com'n v. National Ass'n of Let. Car.,* ..... U.S. ....., 93 S.Ct. 2880, 2891 (1973). This Court has stated: "We hold that when the Executive exercises this power [to admit aliens to this country] negatively on the basis of a facially legitimate and bona fide reason, the court will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Kleindienst v. Mandel, supra,* 408 U.S. 753, 770 (1972).

Appellees Hillery, Spain, Bly and Guile have been deprived of no federally-protected privilege or right by reason of Section 415.071.

CONCLUSION

Appellants urge this Court to set aside the summary judgment ordered by the district court whereby the appellees obtained declaratory and injunctive relief.

Dated, San Francisco, California,
April 8, 1974.

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MICHAEL RODAK, JR.,

73-918

IN THE

Supreme Court of the United States

October Term, 1973

No. 918

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPELLANTS' REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1973

No. 918

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

I. The First Amendment provides the press with protection for newsgathering in order to fulfill the community's constitutionally protected right to receive information.

Appellees seem to be arguing that the First Amendment protects only the "freedom to publish," Appellees' Brief 8, and not the right to gather news. They also contend that the First Amendment does not grant the press "access to a source of information which is not freely open to *all* citizens." Appellees' Brief 6 (emphasis added).

As this Court has made clear, however, the First Amendment grants constitutional protection to more than a right to publish—it recognizes a democratic community's need and right to receive information. *Stanley v. Georgia,* 394 U.S. 577, 564 (1969); *Kleindienst v. Mandel,* 408 U.S. 753, 762-65 (1972). To satisfy this need, the Founding Fathers explicitly singled out and listed the press as one of the preferred interests entitled to the high degree of protection afforded by the First Amendment. And this protection must include newsgathering, or else "freedom of the press would be eviscerated." *Branzburg v. Hayes,* 408 U.S. 664, 681 (1972).

It is for this reason that the press has rights and responsibilities with respect to newsgathering that the general public does not. It would obviously be a good thing if all citizens were ready, willing, and able to ferret out and circulate information of public importance, especially about public institutions. But this is not possible. Only the press has the commitment and the resources to perform that function. This is why, as noted above and in Appellants' Brief at pp. 9, 13-15, 28, the Constitution and the framers of the Bill of Rights explicitly singled out the press as the beneficiary of constitutional protection.

Defendant Park acknowledged as much in his homely illustration: "Where the president of the local Ladies' Aid Society can inform only a few in her group, the media can inform millions of citizens about prison programs." *On Being Medium Nice to Prisoners,* [1973] Wash. U. L. Q. 607, 615. Defendants similarly acknowledged this in the efforts that they have in fact made to provide the press with some "added consideration . . . by assisting them in gathering news. . . ." Appellees' Brief 14-15, 23. Other

public and private institutions make similar special arrangements to facilitate the press's newsgathering function, as described in Appellants' Brief 14-15.

Administrative devices for separating "newsmen" from "non-newsmen" may indeed create some administrative problems, but numerous penal systems, including California before August 21, 1971, and after the interim decree, A. 62-66, 123-25, seem to have managed to handle these, apparently without too much difficulty. For example, California and other jurisdictions issue press passes for many purposes, see A. 123-24, without running afoul of the Constitution.

II. Appellees have discriminated against the press-appellants by denying them the access to specific named inmates that appellees allow many others.

The Court need not, however, decide in this case whether the press's special newsgathering responsibilities imply a special right of access unavailable to other private citizens, for numerous other such citizens do have access to specific named inmates. The narrower question before the Court, therefore, is whether such differentiation is constitutional.

Appellees claim that simply "as members of the general public [appellants] have not been subjected to unlawful discrimination." Appellees' Brief 12. This is purportedly because the denial of a "benefit" is allegedly not absolute, access is allegedly not completely closed off, and appellees claim no constitutional right is involved. The only question is whether there is a "rational" basis for excluding newsmen, and since defendants say they acted for purposes of administrative convenience, rehabilitation and security, the denial of access is said to be rational.

It seems clear, however, that some members of "the general public" do have access to specific named inmates. *Id.* at 22. Moreover, both this Court and others have found that face-to-face contact with the specific people who have the desired information is indispensable to the full exercise of First Amendment rights. *Kleindienst v. Mandel*, 408 U. S. at 765; see cases cited in Appellants' Brief 20, 7, including the decision of the court below on the inmates' rights issue.[1] After all, if an inmate has important information, what is the value of random access tours where the chances of the press encountering that inmate are very, very low? And since the First Amendment is implicated, compare *Cruz v. Beto*, 405 U. S. 319 (1972), much more than a "rational basis" for the differentiation is required, even though a prison is involved.[2]

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[1] This should be contrasted with the Court's finding in *McDonald v. Board of Elections*, 394 U.S. 802, 807 (1969), cited at Appellees' Brief 14, that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." Compare also *Goosby v. Osser*, 409 U.S. 512 (1973) and *O'Brien v. Skinner*, ____ U.S. ____, 38 L.Ed.2d 702, 707 (Jan. 16, 1972).

[2] Almost every circuit that has passed on the question has insisted on a stringent standard for judging the actions of prison officials which encroach upon First Amendment freedoms, especially where we deal not with a prisoner's right to express himself but with the community's right to receive information. See, *e.g.*, *Nolan v. Fitzpatrick*, 451 F.2d 545, 548-49 (1st Cir. 1971); *Goodwin v. Oswald*, 462 F.2d 1237 (2nd Cir. 1972); *Long v. Parker*, 390 F.2d 816, 822 (3d Cir. 1968), but see *O'Malley v. Brierly*, 477 F.2d 785, 796 (3d Cir. 197) (religious visit); *Brown v. Peyton*, 437 F.2d 1228; 1232 (4th Cir. 1971); *Walker v. Blackwell*, 411 F.2d 23, 28-29 (5th Cir. 1969); *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb.), *aff'd*, 452 F.2d 1005 (8th Cir. 1971); *cf. Morales v. Schmidt*, ____ F.2d ____, 72-1373 (7th Cir. 3/22/74) (*en banc*) (mail); *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); *Hoggro v. Pontesso*, 456 F.2d 917, 919 (10th Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (Muslim food);

We thus have differentiation among benefits afforded different groups, which, since it results in a heavy burden on the exercise of First Amendment rights, must be justified under a strict standard. The district court rejected as baseless all the justifications offered by appellees where the inmates' First Amendment rights of expression were concerned, and it is difficult to see how there can be a different result where the First Amendment right to gather news is involved. Indeed, Judge Hamlin concluded as to the inmates' rights that even the minimal "rational basis" test was not satisfied by appellees' justification, see Appendix to Appellants' Brief 48, and that conclusion applies equally to the press rights.

Respectfully submitted.

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Dated: April 9, 1974, Amherst, New York.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PELL ET AL. *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 73–918. Argued April 16–17, 1974—Decided June 24, 1974*

Four California prison inmates and three professional journalists brought this suit in the District Court challenging the constitutionality of a regulation, § 415.071, of the California Department of Corrections Manual, which provides that "[p]ress and other news media interviews with specific individual inmates will not be permitted." That provision was promulgated following a violent prison episode that the correction authorities attributed at least in part to the former policy of free face-to-face prisoner-press interviews, which had resulted in a relatively small number of inmates gaining disproportionate notoriety and influence among their fellow inmates. The District Court granted the inmate appellees' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists unconstitutionally infringed the inmates' First and Fourteenth Amendment freedoms. The court granted a motion to dismiss with respect to the claims of the media appellants, holding that their rights were not infringed, in view of their otherwise available rights to enter state institutions and interview inmates at random and the even broader access afforded prisoners by the court's ruling with respect to the inmate appellees. The prison officials (in No. 73–754) and the journalists (in No. 73–918) have appealed. *Held:*

1. In light of the alternative channels of communication that are open to the inmate appellees, § 415.071 does not constitute a violation of their rights of free speech. Pp. 4–11.

*Together with No. 73–754, *Procunier, Corrections Director* v. *Hillery et al.*, also on appeal from the same court.

Syllabus

(a) A prison inmate retains those First Amendment rights that are not inconsistent with his status as prisoner or with the legitimate penological objectives of the corrections system, and here the restrictions on inmates' free speech rights must be balanced against the State's legitimate interest in confining prisoners to deter crime, to protect society by quarantining criminal offenders for a period during which rehabilitative procedures can be applied, and to maintain the internal security of penal institutions. Pp. 4–6.

(b) Alternative means of communication remain open to the inmates; they can correspond by mail with persons (including media representatives), *Procunier* v. *Martinez*, 416 U. S. —; they have rights of visitation with family, clergy, attorneys, and friends of prior acquaintance; and they have unrestricted opportunity to communicate with the press or public through their prison visitors. Pp. 6–11.

2. The rights of the media appellants under the First and Fourteenth Amendments are not infringed by § 415.071, which does not deny the press access to information available to the general public. Newsmen, under California policy, are free to visit both maximum and minimum security sections of California penal institutions and to speak with inmates whom they may encounter, and (unlike members of the general public) are also free to interview inmates selected at random. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg* v. *Hayes*, 408 U. S. 665, 684. Pp. 11–17.

364 F. Supp. 196, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined and in Part I of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 73–918 AND 73–754

Eve Pell, Betty Segal and Paul Jacobs, Appellants,
73–918 *v.*
Raymond K. Procunier, Director, California Department of Corrections, et al.

Raymond K. Procunier, Director, California Department of Corrections, et al., Appellants,
73–754 *v.*
Booker T. Hillery, Jr., et al.

On Appeals from the United States District Court for the Northern District of California.

[June 24, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases are here on cross-appeals from the judgment of a three-judge District Court in the Northern District of California. The plaintiffs in the District Court were four California prison inmates—Booker T. Hillery, Jr., John Larry Spain, Bobby Bly, and Michael Shane Guile—and three professional journalists—Eve Pell, Betty Segal, and Paul Jacobs. The defendants were Raymond K. Procunier, Director of the California Department of Corrections, and several subordinate officers in that department. The plaintiffs brought the suit to challenge the constitutionality, under the First and Fourteenth Amendments, of § 415.071 of the California Department of Corrections Manual, which provides that

"[p]ress and other media interviews with specific individual inmates will not be permitted." They sought both injunctive and declaratory relief under 42 U. S. C. § 1983. Section 415.017 was promulgated by defendant Procunier under authority vested in him by § 5058 of the California Penal Code and is applied uniformly throughout the State's penal system to prohibit face-to-face interviews between press representatives and individuals inmates whom they specifically name and request to interview. In accordance with 28 U. S. C. §§ 2281 and 2284, a three-judge court was convened to hear the case.[1]

The facts are undisputed. Pell, Segal, and Jacobs each requested permission from the appropriate corrections officials to interview inmates Spain, Bly, and Guile, respectively. In addition, the editors of a certain periodical requested permission to visit inmate Hillery to discuss the possibility of their publishing certain of his writings and to interview him concerning conditions at the prison.[2] Pursuant to § 415.017, these requests were all denied.[3]

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[1] This litigation was first initiated before a single judge and proceeded for nearly a year with the court's attention focused on the interview practice at San Quentin State Penitentiary, where all the inmate plaintiffs are confined, where the interviews sought by the media plaintiffs were to occur, and where all the defendants, except Mr. Procunier, are employed. After the matter was briefed and argued, the single judge preliminarily enjoined the enforcement of § 415.071. Only then did the defendants bring to the court's attention that § 415.071 was a regulation of state-wide application. Thereafter a three-judge court was convened to pass on the constitutional validity of the regulation.

[2] The periodical has since ceased publication and its editors did not join the media plaintiffs in this litigation.

[3] There is some question as to whether the interview between Hillery and the magazine editors was denied under the authority of § 415.071. Department of Corrections interview-policy permits, on a case-by-case basis, meetings between inmate authors and their publishers. The defendants contend that the interview was denied

The plaintiffs thereupon sued to enjoin the continued enforcement of this regulation. The inmate plaintiffs contended that § 415.071 violates their rights of free speech under the First and Fourteenth Amendments. Similarly, the media plaintiffs asserted that the limitation that this regulation places on their news-gathering activity unconstitutionally infringes the freedom of the press guaranteed by the First and Fourteenth Amendments.

The District Court granted the inmate plaintiffs' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists, unconstitutionally infringed their First and Fourteenth Amendment freedoms. With respect to the claims of the media plaintiffs, the court granted the defendants' motion to dismiss. The court noted that "[e]ven under § 415.071 as it stood before today's ruling [that inmates' constitutional rights were violated by § 415.071] the press was given the freedom to enter the California institutions and interview at random," and concluded "that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates." 364 F. Supp. 196, 200.

In No. 73–754, Corrections Director Procunier and the other defendants appeal from the judgment of the District Court that § 415.071 infringes the inmate plaintiffs' First and Fourteenth Amendment rights. In No. 73–918, the media plaintiffs appeal the court's rejection of their claims. We noted probable jurisdiction of both appeals

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here because the officials made an individualized determination that the meeting was not in fact necessary to effectuate the publication of Hillery's works. Hillery, on the other hand, notes that the editors had indicated to the prison officials that they also wished to discuss with Hillery the conditions in the prison in order to publish an article on that subject. Thus, it appears that the denial was in all likelihood based at least in part on § 415.071.

and consolidated the cases for oral argument. —— U. S. ——, ——.

I

In No. 73–754, the inmate plaintiffs claim that § 415.071, by prohibiting their participation in face-to-face communication with newsmen and other members of the general public, violates their right of free speech under the First and Fourteenth Amendments. Although the constitutional right of free speech has never been thought to embrace a right to require a journalist or any other citizen to listen to a person's views, let alone a right to require a publisher to publish those views in his newspaper, see *Avins* v. *Rutgers, State University of New Jersey*, 385 F. 2d 151 (CA3 1967); *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, 435 F. 2d 470 (CA7 1970); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F. 2d 133 (CA9 1971), we proceed upon the hypothesis that under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher.

We start with the familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). See also *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972). In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of

the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

The regulation challenged here clearly restricts one manner of communication between prison inmates and members of the general public beyond the prison walls. But this is merely to state the problem, not to resolve it. For the same could be said of a refusal by corrections authorities to permit an inmate temporarily to leave the prison in order to communicate with persons outside. Yet no one could sensibly contend that the Constitution requires the authorities to give even individualized consideration to such requests. Cf. *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965). In order properly to evaluate the constitutionality of § 415.071, we think that the regulation

cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. We recognize that there "may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," and "that [the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of appellees in this particular form of access." *Kleindienst* v. *Mandel*, 408 U. S. 753, 765 (1972). But we regard the available "alternative means of [communication] . . . [as] a relevant factor" in a case such as this where "we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests." *Ibid.*

One such alternative available to California prison inmates is communication by mail. Although prison regulations until recently called for the censorship of statements, *inter alia*, that "unduly complain" or "magnify grievances," that express "inflammatory political, racial, or religious, or other views," or that were deemed "defamatory" or "otherwise inappropriate," we recently held that "the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands," and accordingly affirmed a district court judgment invalidating the regulations. *Procunier* v. *Martinez*, — U. S. —, — (1974) (slip op., pp. 19–20). In addition, we held that "[t]he interests of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." Accordingly, we concluded that any "decision to censor or withhold delivery of a particular letter must be accompanied by minimal procedural safeguards." *Id.*, at

20–22 (slip op.). Thus, it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.

Moreover, the visitation policy of the California Corrections Department does not seal the inmate off from personal contact with those outside the prison. Inmates are permitted to receive limited visits from members of their families, the clergy, their attorneys, and friends of prior acquaintance.[4] The selection of these categories of visitors is based on the Director's professional judgment that such visits will aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system. This is not a case in which the selection is based on the anticipated content of the communication between the inmate and the prospective visitor. If a member of the press fell within any of these categories, there is no suggestion that he would not be permitted to visit with the inmate. More importantly, however, inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison. Thus, this provides another alternative ave-

[4] This policy does not appear to be codified or otherwise expressly articulated in any generally applicable rule or regulation. The statement of visiting privileges for San Quentin State Prison indicates that all visitors must be approved by the corrections officials and must be either "members of the family or friends of long standing." It also permits visits by attorneys to their clients. Although nothing is said in this statement about visits by members of the clergy, there is no dispute among the parties that the practice of the Department of Corrections is to permit such visits. There is also no disagreement among the parties that this visitation policy is generally applied by the Department throughout the state corrections system.

nue of communication between prison inmates and persons outside the prison.

We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser* v. *Rodriguez*, 411 U. S. 475, 492 (1973).

In *Procunier* v. *Martinez*, *supra*, we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So lang as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded great latitude." *Cruz* v. *Beto*, *supra*, at 321.

In a number of contexts, we have held "that reasonable 'time, place, and manner' regulations [of communicative activity] may be necessary to further significant governmental interests, and are permitted." *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *Lou-*

isiana, 379 U. S. 536, 554–555 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1968). "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned, supra*, at 116 (internal quotations omitted). The "normal activity" to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security. Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.

In this case the restriction takes the form of limiting visitations to individuals who have either a personal or professional relationship to the inmate—family, friends of prior acquaintance, legal counsel, and clergy. In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of com-

munication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation.

Accordingly, in light of the alternative channels of communication that are open to prison inmates,[5] we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional. So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject," *Cruz* v. *Beto, supra,* at 321, and

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[5] It is suggested by the inmate-appellees that the use of the mails as an alternative means of communication may not be effective in the case of prionsers who are inarticulate or even illiterate. There is no indication, however, that any of the four inmates before the Court suffer from either of these disabilities. Indeed, the record affirmatively shows that two of the inmates are published writers. Although the complaint was filed as a class action, the plaintiffs never moved the District Court to certify the case as a class action as required by F. R. C. P. 23 (b) (3) and (c). Thus, the short answer to the inmates' contention is that there is neither a finding by the District Court nor support in the record for a finding that the alternative channels of communication are not an effective means for the inmates-appellees to express themselves to persons outside the prison.

Even with respect to inmates who may not be literate or articulate, however, there is no suggestion that the corrections officials would not permit such inmates to seek the aid of fellow inmates or of family and friends who visit them to commit their thoughts to writing for communication to individuals in the general public. Cf. *Johnson* v. *Avery,* 393 U. S. 483 (1969). Merely because such inmates may need assistance to utilize one of the alternative channels does not make it an ineffective alternative, unless, of course, the State prohibits the inmate from receiving such assistance.

does not abridge any First Amendment freedoms retained by prison inmates.[6]

II

In No. 73–918, the media plaintiffs ask us to hold that the limitation on press interviews imposed by § 415.071 violates the freedom of the press guaranteed by the First and Fourteenth Amendments. They contend that, irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview

[6] The inmates argue that restricting their access to press representatives unconstitutionally burdens their First and Fourteenth Amendment right to petition the government for the redress of grievances. Communication with the press, the inmates contend, provides them with their only effective opportunity to communicate their grievances, through the channel of public opinion, to the legislative and executive branches of the government. We think, however, that the alternative means of communication with the press that are available to prisoners, together with the substantial access to prisons that California accords the press and other members of the public, see *infra*, at 12–13, satisfies whatever right the inmates may have to petition the government through the press.

We also note that California accords prison inmates substantial opportunities to petition the executive, legislative, and judicial branches of government directly. Section 2600 of the California Penal Code permits an inmate to correspond confidentially with any public office holder. And various rules promulgated by the Department of Corrections explicitly permit an inmate to correspond with the Governor, any other elected state or federal official, and any appointed head of a state or federal agency. Similarly, California has acted to assure prisoners the right to petition for judicial relief. See, *e. g.*, *In re Jordan*, 7 Cal. 3d 930 (1972); *In re Van Geldern*, 5 Cal. 3d 832 (1971); *In Re Harrell*, 2 Cal. 3d 675 (1970). Section 845.4 of the California Government Code also makes prison officials liable for intentional interference with the right of a prisoner to obtain judicial relief from his confinement.

might create a clear and present danger to prison security or to some other substantial interest served by the corrections system. In this regard, the media plaintiffs do not claim any impairment of their freedom to publish, for California imposes no restrictions on what may be published about its prisons, the prison inmates, or the officers who administer the prisons. Instead, they rely on their right to gather news without governmental interference, which the media plaintiffs assert includes a right of access to the sources of what is regarded as newsworthy information.

We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions.[7] The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum and mini-

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[7] This policy reflects a recognition that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance. As THE CHIEF JUSTICE has commented, we cannot "continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence . . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem." W. Burger, "Our Options are Limited," pp. 4–5 (Remarks before the 1972 Annual Dinner of the National Conference on Christians and Jews, Phila., Pa., Nov. 16, 1972). Along the same lines, THE CHIEF JUSTICE has correctly observed that "[i]f we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change . . . . A visit to most prisons will make you a zealot for prison reform." W. Burger, "For Whom the Bell Tolls," pp. 9–11 (Remarks before the Assn. of the Bar of the City of New York, N. Y., N. Y., Feb. 17, 1970).

mum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials from the prison population. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants. In short, members of the press enjoy access to California prisons that is not available to other members of the public.

The sole limitation on newsgathering in California prisons is the prohibition in § 415.071 of interviews with individual inmates specifically designated by representatives of the press. This restriction is of recent vintage, having been imposed in 1971 in response to a violent episode that the Department of Corrections felt was at least partially attributable to the former policy with respect to face-to-face prisoner-press interviews. Prior to the promulgation of § 415.071, every journalist had virtually free access to interview any individual inmate whom he might wish. Only members of the press were accorded this privilege; other members of the general public did not have the benefit of such an unrestricted visitation policy. Thus, the promulgation of § 415.071 did not impose a discrimination against press access, but merely eliminated a special privilege formerly given to representatives of the press vis-à-vis members of the public generally.[8]

[8] It cannot be contended that because California permits family, friends, attorneys, and clergy to visit inmates, it cannot limit visitations by the press. No member of the general public who does not have a personal or professional relationship to the inmate is permit-

In practice, it was found that the policy in effect prior to the promulgation of § 415.071 had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual "public figures" within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems. For example, extensive press attention to an inmate who espoused a practice of noncooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institutions' ability to deal effectively with the inmates generally. Finally, in the words of the District Court, on August 21, 1971, "[d]uring an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23, § 415.071 was adopted to mitigate the problem." 364 F. Supp., at 198. It is against this background that we consider the media plaintiffs claims under the First and Fourteenth Amendments.

The constitutional guarantee of a free press "assures the maintenance of our political system and an open society," *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967), and secures "the paramount public interest in a free flow of information to the people concerning public officials," *Garrison* v. *Louisiana*, 379 U. S. 74, 77 (1964). See also *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

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ted to enter the prison and name an inmate with whom he would like to engage in face-to-face discourse. Thus, the press is granted the same access in this respect to prison inmates as is accorded any member of the general public. Indeed, as is noted in the text, the aggregate access that the press has to California prisons and their inmates is substantially greater than that of the general public.

By the same token, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times* v. *United States*, 403 U. S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Near* v. *Minnesota*, 283 U. S. 697 (1931). Correlatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published. *Kleindienst* v. *Mandel, supra*, at 762–763; *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969).

In *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), the Court went further and acknowledged that "newsgathering is not without some First Amendment protection," at 707, for "without some protection for seeking out the news, freedom of the press could be eviscerated," at 681. In *Branzburg* the Court held that the First and Fourteenth Amendments were not abridged by requiring reporters to disclose the identity of their confidential sources to a grand jury when that information was needed in the course of a good-faith criminal investigation. The Court there could "perceive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial," at 690–691.

In this case, the media plaintiffs contend that § 415.071 constitutes governmental interference with their newsgathering activities that is neither consequential nor uncertain, and that no substantial governmental interest can be shown to justify the denial of press access to

specifically designated prison inmates. More particularly, the media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press—access broader than is accorded members of the public generally—face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press. We do not agree.

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . . . Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." *Branzburg* v. *Hayes, supra,* at 684–685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.[9] It is one thing to

[9] As Chief Justice Warren put the matter in writing for the Court in *Zemel* v. *Rusk,* 381 U. S. 1, 16–17 (1965), "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestricted right to gather information."

say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. *Branzburg* v. *Hayes, supra,* and that government cannot restrain the publication of news emanating from such sources. Cf. *N. Y. Times* v. *United States, supra.* It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court. Accordingly, since § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.

For the reasons stated, we reverse the District Court's judgment that § 415.071 infringes the freedom of speech of the prison inmates and affirm its judgment that that regulation does not abridge the constitutional right of a free press. Accordingly, the judgment is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 73–918 AND 73–754

Eve Pell, Betty Segal and Paul Jacobs, Appellants,
73–918 *v.*
Raymond K. Procunier, Director, California Department of Corrections, et al.

Raymond K. Procunier, Director, California Department of Corrections, et al., Appellants,
73–754 *v.*
Booker T. Hillery, Jr., et al.

On Appeals from the United States District Court for the Northern District of California.

[June 24, 1974]

MR. JUSTICE POWELL, concurring and dissenting.

These cross-appeals concern the constitutionality, under the First and Fourteenth Amendments, of a regulation of the California Department of Corrections that prohibits all personal interviews of prison inmates by representatives of the news media. This regulation is substantially identical to the United States Bureau of Prisons policy statement whose validity is at issue in *Saxbe* v. *Washington Post Co.*, *post*. For the reasons stated in my dissenting opinion in that case, *post*, at ——, I would hold that California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their Government. Accordingly, I dissent from the judgment of the Court.

The California cross-appeals differ from the *Washington Post* case in one significant respect. Here the constitutionality of the interview ban is challenged by prisoners as well as newsmen. Thus these appeals, unlike *Washington Post*, raise the question whether inmates as individuals have a personal constitutional right to demand interviews with willing reporters. Because I agree with the majority that they do not, I join Part I of the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

Nos. 73–918, 73–754, AND 73–1265

Eve Pell, Betty Segal and Paul Jacobs, Appellants, 73–918 *v.* Raymond K. Procunier, Director, California Department of Corrections, et al. Raymond K. Procunier, Director, California Department of Corrections, et al., Appellants, 73–754 *v.* Booker T. Hillery, Jr., et al.	On Appeals from the United States District Court for the Northern District of California.
William B. Saxbe, Attorney General of the United States, et al., Petitioners, 73–1265 *v.* The Washington Post Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

These cases involve the constitutionality, under the First and Fourteenth Amendments, of prison regulations limiting communication between state and federal prisoners and the press. No. 73–754 and No. 73–918 are cross-appeals from the judgment of a three-judge District Court for the Northern District of California. 364 F. Supp. 196. Suit was brought in that court by four Cali-

fornia state prisoners and three professional journalists challenging the constitutionality of California Department of Corrections Manual § 415.071 which imposes an absolute ban on media interviews with individually designated inmates.

The court upheld the prisoner's claim that this regulation is violative of their right of Free Speech, and, in No. 73–754, the Director of the California Department of Corrections appeals from the court's injunction against further enforcement of the regulation. As to the journalists' claim, the court noted: "The media plaintiffs herein and amicus curiae argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also of the press.' The court disagrees." 396 F. Supp., at 199. In No. 73–918, the journalists appeal this rejection of their claim.

No. 73–1265 involves a media challenge to Federal Bureau of Prisons Policy Statement 1220.1A, ¶ 4 (b)(6) which prohibits press interviews with any particular federal prisoner in any medium or maximum security facility. The District Court held the total ban violative of the First Amendment's Free Press guarantee and enjoined its enforcement. 357 F. Supp. 770. The Court of Appeals affirmed. — F. 2d —. As the majority notes, "[t]he policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies" here under review.

I

In analyzing the prisoner challenge to California's absolute ban on media interviews with individual inmates, I start with the proposition that "foremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment.

Prisoners are still 'persons' entitled to all constitutional rights except and unless their liberty has been constitutionally curtailed in procedures that satisfy all the requirements of due process . . . . Free speech and press within the meaning of the First Amendment is, in my judgment, one of the preeminent privileges and immunities of all citizens." *Procunier* v. *Martinez*, — U. S. —, — (DOUGLAS, J., concurring). With that premise, I cannot agree with the Court that California's grossly overbroad restrictions on prisoner speech are constitutionally permissible. I agree that prison discipline, inmate safety and rehabilitation must be considered in evaluating First Amendment rights in the prison context. First Amendment principles must always be applied "in light of the special characteristics of the . . . environment." *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506; *Healy* v. *James*, 408 U. S. 169, 180. But the prisoners here do not contend that prison officials are powerless to impose reasonable limitations on visits by the media which are necessary in particularized circumstances to maintain security, discipline and good order.

All that the prisoners contend, and all that the courts below found, is that these penal interests cannot be used as a justification for an absolute ban on media interviews because "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. And see *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

It is true that the prisoners are left with other means of expression such as visits by relatives and communication by mail. But the State can hardly defend an overly

broad restriction on expression by demonstrating that it has not eliminated expression completely.

As Justice Black has said:

> "I cannot accept my Brother Harlan's view [in dissent] that the abridgement of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." *NLRB* v. *Fruit Packers*, 377 U. S. 58, 79–80 (concurring).

A State might decide that criticism of its affairs could be reduced by prohibiting all its employees from discussing governmental operations in interviews with the media, leaving criticism of the State to those with the time, energy, ability and inclination to communicate through the mails. The prohibition here is no less offensive to First Amendment principles; it flatly prohibits interview communication with the media on the government's penal operations by the only citizens with the best knowledge and real incentive to discuss them.

I agree with the court below that the State's interest in order and prison discipline cannot justify its total ban on all media interviews with any individually designated inmate on any matter whatsoever. Such a coarse attempt at regulation is patently unconstitutional in an area where "[p]recision of regulation must be the touchstone." *NAACP* v. *Button*, *supra*; *Elfbrandt* v. *Russell*, 384 U. S. 11, 18. I would affirm the District Court's judgment in this regard.

II

In No. 73–918 and No. 73–1265, the media claim that the state and federal prison regulations here, by flatly prohibiting interviews with inmates selected by the press, impinges upon the First Amendment's Free Press guarantee, directly protected against federal infringement and protected against state infringement by the Fourteenth Amendment. In rejecting the claim, the Court notes the ban on access to prisoners applies as well to the general public and it holds that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Ante*, at —.

In dealing with the Free Press guarantee, it is important to note that the interest it protects is not possessed by the media itself. In enjoining enforcement of the federal regulation in No. 73–1265, Judge Gesell did not vindicate any right of the Washington Post, but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner. "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people." *Branzburg* v. *Hayes*, 408 U. S. 665, 721 (DOUGLAS, J., dissenting).

Prisons, like all other public institutions, are ultimately the responsibility of the populace. Crime, like the economy, health, education, defense, and the like, is a matter of grave concern in our society and people have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it. "On any given day, approximately 1,500,000 people are under the authority of [federal, state

and local] prison systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society." [1] The public's interest in being informed about prisons is thus paramount.

As with the prisoners' Free Speech claim, no one asserts that the Free Press right is such that the authorities are powerless to impose reasonable regulations as to the time, place and manner of interviews to effectuate prison discipline and order. The only issue here is whether the complete ban on interviews with inmates selected by the press goes beyond what is necessary for the protection of these interests and infringes upon our cherished right of a free press. As the Court of Appeals noted in No. 73–1265: "[W]hile we do not question that the concerns voiced by the Bureau [of Prisons] are legitimate interests that merit protection, we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose." — F. 2d —, —.

It is thus not enough to note that the press—the institution which "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs" [2]—is denied no more access to the prisons than is denied the public generally. The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with

[1] Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, Report on the Inspection of the Federal Facilities at Leavenworth Penitentiary and the Medical Center for Federal Prisoners, at 2 (93d Cong., 2d Sess., Comm. Print. 1974).

[2] *Mills* v. *Alabama*, 384 U. S. 214, 219.

whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.

It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?

I agree with the courts below in No. 73–1265 that the absolute ban on press interviews with specifically designated federal inmates is far broader than is necessary to protect any legitimate governmental interests and is an unconstitutional infringement on the public's right to know protected by the Free Press guarantee of the First Amendment. I would affirm the judgment in this regard. Since this basic right is guaranteed against state infringement by the application of the First Amendment to the States through the Fourteenth,[1] California's absolute ban can fare no better. I would reverse the District Court's rejection of this claim in No. 73–918.

[1] "While Chief Justice Hughes in *Stromberg* v. *California*, 283 U. S. 359, stated that the First Amendment was applicable to the States by Reason of the Due Process Clause of the Fourteenth, it has become customary to rest on the broader foundation of the entire Fourteenth Amendment. Free speech and press within the meaning of the First Amendment is, in my judgment, one of the preeminent privileges and immunities of all citizens." *Procunier* v. *Martinez*, — U. S. —, — (DOUGLAS, J., concurring).